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Supreme Court of the United States
OCTOBER TERM, 1976

No.

76-529

MONTANA POWER COMPANY ET AL., *Petitioners*,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ET AL., *Respondents*.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on August 2, 1976.*

* This petition is filed on behalf of the Montana Power Company, Pacific Power and Light Company, Portland General Electric Company, Puget Sound Power & Light Company, and the Washington Water Power Company, petitioners in No. 1763 below; the Pacific Coal Gasification Company and Transwestern Coal Gasification Company, petitioners in No. 75-1371 below; The Dayton Power and Light Co., Kentucky Power Company, Ohio Edison Company, and Ohio Power Company, petitioners in No. 75-1663 below; and the Cincinnati Gas & Electric Company, The Cleveland Electric Illuminating Company, and Columbus and Southern Ohio Electric Company, petitioners in No. 75-1664 below. Insofar as petitioners can determine, the parties to the consolidated proceedings below that will be adverse respondents to the petition are the United States Environmental Protection Agency, its Administrator (Russell E. Train), Sierra Club, the Washington Metropolitan Coalition for Clean Air, New Mexico Citizens for Clean Air and Water, Oregon Environmental Council, Sally Rodgers, John Tanton, Susan L. Moore, Stephen Winter, and the States of New Mexico and Nevada. The remaining interested parties below are automatically respondents to this petition, pursuant to this Court's Rule 21(4), but, insofar as petitioners know, they will not be adverse to this petition. These Rule 21(4) respondents are listed in Appendix G hereto.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A hereto) has not yet been officially reported, but is unofficially reported at 9 ERC 1129. That opinion reviewed regulations promulgated by the Environmental Protection Agency, as amendments to state implementation plans under the Clean Air Act, which were published in the Federal Register, together with an explanatory preamble, on December 5, 1974 (39 F.R. 42509), and were revised on January 16, 1975 (40 F.R. 2802), June 12, 1975 (40 F.R. 25004) and September 10, 1975 (40 F.R. 42011). The regulations thus promulgated amended Part 52 of 40 C.F.R., and are attached along with the explanatory preamble as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals (Appendix C hereto) was entered on August 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency has authority, under the Clean Air Act as amended, to promulgate regulations amending State plans for the implementation of the national ambient air quality standards established pursuant to that Act so as to include therein provisions for the prevention of significant deterioration of air quality that is better than is required to comply with those standards, and to disapprove the implementation plans adopted by each of the individual States because they failed to include such significant deterioration provisions?

2. Assuming that the Environmental Protection Agency does have such authority, whether the significant deterioration regulations which it has promulgated

nonetheless are arbitrary or capricious or otherwise violate the Clean Air Act, because:

(a) they attempt to prevent "significant deterioration" through a classification scheme that is unrelated to any known, anticipated or quantifiable adverse air quality effects;

(b) they do not initially classify all lands as Class III, rather than as Class II, so as to at least place the burden of obtaining and justifying a reclassification of land upon those who seek to impose more stringent limitations than are imposed by the national ambient air quality standards;

(c) they arbitrarily impose rigid incremental limits for each classification which do not allow for local conditions, which are implemented through modeling techniques that generally are inaccurate and are virtually unworkable for many areas of the nation, and which may be used up by unregulated new sources;

(d) they provide for reclassification of Federal and Indian lands by Federal land managers and the governing bodies of Indian Tribes, thereby treating such landowners differently from other persons and encroaching upon the responsibilities of the States, which may have the effect of imposing more stringent limitations upon adjoining lands up to 60 or more miles from the boundaries of such Federal or Indian lands** ; or because

(e) they were promulgated without compliance with the procedural requirements specified in § 110 of the Clean Air Act?

3. Assuming that the Environmental Protection Agency does have such authority and its significant

** A question also is presented as to whether this aspect of the regulations is ripe for review.

deterioration regulations otherwise comply with the Clean Air Act, whether those regulations and the Act as so construed are unconstitutional because:

(a) the Act does not provide any standards or guidance for determining what constitutes "significant deterioration" of the quality of air, as to the manner in which it is to be prevented, or as to the extent to which it is to be prevented, and therefore constitutes an unrestrained delegation of legislative power to the Environmental Protection Agency contrary to Article I, Section I of the Constitution, and to the Fifth Amendment thereto;

(b) the regulations so restrict the use of private property as to constitute an uncompensated "taking" in violation of the Fifth Amendment, and do not have any rational relationship to the protection of public health or welfare or other valid legislative purpose contrary to the Fifth Amendment; or because

(c) the regulations impose local land use controls and otherwise encroach upon the powers reserved to the States and to the people by the Tenth Amendment and by Article IV, Section IV?

CONSTITUTION, STATUTE AND REGULATIONS INVOLVED

The regulations being reviewed, 40 C.F.R. §§ 52.01 (d), (f), and 52.21 (1975), *as amended*, 40 F.R. 42011 (September 10, 1975), are set forth in Appendix B hereto. The relevant provisions of the Constitution and of the Clean Air Act, *as amended*, 42 U.S.C. § 1857 *et seq.*, are set forth respectively in Appendices D and E hereto. Relevant provisions of certain earlier versions of the Clean Air Act (77 Stat. 392 (1963) and 81 Stat. 485 (1967)) are set forth in Appendix F hereto.

STATEMENT OF THE CASE

This case involves the interpretation and application of the Clean Air Act, *as amended*, 42 U.S.C. §§ 1857 *et seq.* In particular, this case involves the issue of "significant deterioration," an issue on which this Court three years ago divided four-to-four in *Fri v. Sierra Club*.¹ In compliance with the district court's order in that earlier litigation, the Administrator of the Environmental Protection Agency (hereinafter "EPA") has disapproved plans adopted by every State for the implementation of national primary and secondary ambient air quality standards and has amended or revised those plans by promulgating regulations which include therein provisions preventing "significant deterioration" of the quality of air that is cleaner than is required by the national primary and secondary standards. Those actions by EPA have been upheld by the court below in this proceeding.

This has been done even though the national ambient air quality standards are prescribed by EPA under § 109 of the Clean Air Act at levels "requisite to protect the public health" after "allowing an adequate margin of safety" (primary standards) and "requisite to protect the public welfare from any known or anticipated adverse effects" (secondary standards); and even though § 110 of the Act provides that EPA "shall approve" a State implementation plan that meets eight specified requirements, none of which has been contended or held to include the prevention of

¹ *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D. D.C., 1972), *aff'd per curiam*, 4 ERC 1815 (D.C. Cir., 1972), *aff'd by equally divided Court, sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973). See pp. 11-12 *infra*. Petitioners were not parties to that litigation.

significant deterioration. The only asserted statutory basis for the significant deterioration regulations is the statement in the introductory "Findings and Purposes" section (§ 101) that one of the purposes of the Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."

A. The Clean Air Act

For the most part, the relevant provisions of the Clean Air Act were enacted by the Clean Air Act Amendments of 1970 (84 Stat. 1676), as summarized below. However, the "Findings and Purposes" section of the Act was first enacted in substantially its present form by the Clean Air Act of 1963 (77 Stat. 392). This includes the finding that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments," which now appears unchanged in § 101(a)(3), 42 U.S.C. § 1857(a)(3). It also includes the statement of purpose "to protect the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population". That statement, as amended by the Air Quality Act of 1967 (81 Stat. 485) to add "and enhance the quality of" after "to protect," is now set forth in § 101(b)(1), 42 U.S.C. § 1857(b)(1). As has been noted, that purpose clause is the only provision of the Clean Air Act which has been urged or held to provide a statutory basis for a requirement of Federal action preventing significant deterioration.

Since the major underlying premise upon which the requirement of preventing significant deterioration

rests is the protection, rather than the enhancement, of air quality that exceeds Federal standards, any such requirement must come, if at all, from the "protect", rather than from the "enhance", language. Therefore, it would seem that if such a requirement exists, it must have originated in 1963. Yet, as this Court pointed out in *Train v. Natural Resources Def. Council*, 421 U.S. 60, 63-64 (1975), the only direct Federal intervention authorized by the 1963 Act was "to abate *inter-state* pollution in limited circumstances" (emphasis by the Court); namely, suits by the Attorney General for the abatement of "pollution of air which is endangering the health or welfare of persons" in other States (§ 5, 77 Stat. 396-99). Moreover, while the 1967 Act "increased the federal role in the prevention of air pollution, by according federal authorities certain powers of supervision and enforcement," under that Act "the States generally retained wide latitude to determine both the air quality standards which they would meet and the period of time in which they would so do." *Train v. Natural Resources Def. Council*, *supra* at 64. Insofar as we are aware, no one has even suggested that there is any legislative history of the 1963 Act indicating that the Congress nonetheless intended to require the prevention of significant deterioration, and the legislative history of the 1967 Act also provides no support for any such requirement.²

² The court below did state that "to a lesser degree, the legislative history of the" 1967 Act "expressed a policy of nondeterioration" (App. A, at 18a). It cited (*id.*, n. 30, p. 18a) a statement in S. Rep. No. 90-403, 90th Cong., 1st Sess. (1967), which "quoted Senator Muskie for the proposition that it was necessary 'to assure the lessening of current levels of pollution and to prevent further environmental deterioration in the future.'" That language was taken from a sentence which stated in full: "We must define the

[continued]

This brings us to the Clean Air Amendments of 1970 which, as this Court has stated, "sharply increased federal authority and responsibility in the continuing effort to combat air pollution," but "[n]one-theless . . . explicitly preserved the principle" that "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . ." *Train v. Natural Resources Def. Council, supra* at 64 (quoting § 107(a), 42 U.S.C. § 1857c-2(a)).

Under the provisions of the 1970 Amendments, EPA designates each air pollutant which in its "judgment has an adverse effect on public health or welfare" (§ 108(a)(1)(A), 42 U.S.C. § 1857c-3(a)(1)(A)), and establishes national primary and secondary ambient air quality standards for each such air pollutant (§ 109(a), 42 U.S.C. § 1857c-4(a)). A primary standard is set at the level which EPA deems "requisite to protect the public health" after "allowing an adequate margin of safety." A secondary standard is set at the level which EPA deems "requisite to protect the public welfare from any known or anticipated adverse effects associated with the pres-

steps necessary to assure the lessening of current levels of pollution and to prevent further environmental deterioration in the future," and Senator Muskie went on in the next quoted sentence to say that: "And recognizing the importance of the economic-technological-environmental relationship *we must develop the requisite framework to implement the desired goals.*" S. Rep. No. 90-403, *supra* at 8-9 (emphasis added). No one has suggested that the Congress in the 1967 Act did "define the steps necessary" to prevent significant deterioration or "develop the framework to implement" any "desired goal" in that regard, and no one has suggested that there is any other legislative history of the 1967 Act indicating an intent on the part of Congress to require prevention of significant deterioration.

ence of such air pollutant in the ambient air" (§ 109(b), 42 U.S.C. § 1857c-4(b)).³ EPA also prescribes standards of performance for new stationary sources which limit the emission of pollutants by new facilities (including modifications of existing facilities) to the level "achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction)" EPA "determines has been adequately demonstrated" (§ 111, 42 U.S.C. § 1857c-6).

Also under those provisions of the 1970 Amendments, each State has "the primary responsibility for assuring air quality within . . . such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved . . . in such State" (§ 107(a), 42 U.S.C. § 1857c-2(a)). Thus, "after reasonable notice and public hearings," each State adopts plans for "implementation, maintenance, and enforcement" of the primary and secondary standards and submits such plans to EPA for approval (§ 110(a)(1), 42 U.S.C. § 1857c-5(a)(1)). EPA "shall approve" such a plan so submitted if it satisfies eight criteria or requirements specified in § 110(a)(2) of the Act, 42 U.S.C. § 1857c-5(a)(2), and also "shall approve" any revision by a State of the plan if such revision

³ The 1970 Amendments also included the following explanation of the term "welfare":

"All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." § 302(h), 42 U.S.C. § 1857h(h).

sion meets those specified "requirements" (§ 110(a)(3)(A), 42 U.S.C. (Supp. V) § 1857e-5(a)(3)(A)). It has never been contended by any litigant or held by any court in this proceeding (or in the preceding litigation) that any of those eight requirements consists of or includes the prevention of significant deterioration of the quality of air which would remain as clean as or cleaner than is required by the national ambient air quality standards.⁴

Moreover, § 110 not only provides that EPA "shall approve" State plans that satisfy those eight requirements, but authorizes EPA to propose "regulations setting forth an implementation plan, or portion thereof, for a State" only if the plan submitted by the State (or any portion thereof) "is determined by" EPA "not to be in accordance with the *requirements of this section*" (emphasis added, § 110(c)(1), 42 U.S.C. § 1857e-5(c)(1)). If such regulations are proposed by EPA, it must hold public hearings "within such State on any proposed regulation" unless the State has done so, and final regulations can be promulgated to become part of a State implementation plan only if the State in the meantime has not voluntarily adopted and submitted a "plan (or revision) which" EPA "determines to be in accordance with the *requirements of this section*" (*ibid.*; emphasis added).

Finally, we note that § 116 of the Act, 42 U.S.C. (Supp. V) § 1857d-1, expressly preserves the right of the States to include in implementation plans more "stringent" limitations upon air pollution than are re-

⁴ To the contrary, those requirements are directed towards the "attainment" of primary standards "as expeditiously as practicable" and of secondary standards within "a reasonable time" (§ 110(a)(2)(A), 42 U.S.C. § 1857e-5(a)(2)(A)).

quired by the Act. And § 118, 42 U.S.C. § 1857f, requires Federal departments, agencies and instrumentalities to "comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements," except where exempted therefrom by the President in certain limited circumstances in which such an exemption is authorized by that section.

B. The Significant Deterioration Regulations

Shortly after the passage of the Clean Air Act Amendments of 1970, EPA construed the Act to require approval of State implementation plans which complied with the eight criteria specified in § 110(a)(2), and thus that agency did not find that it had the authority under the Act to disapprove such plans for failure to include a significant deterioration provision or to promulgate regulations amending the plans to include such a provision. When the Administrator described this interpretation of the Act to the responsible Congressional committees in January and February 1972,⁵ the Sierra Club and other groups filed a suit in the United States District Court for the District of

⁵ Hearings on *Clean Air Act Oversight* before the Subcomm. on Public Health and Environment of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 2d Sess., ser. 92-105 (1972) at 530-31; Hearings on *Implementation of the Clean Air Act Amendments of 1970* before the Subcomm. on Air and Water Pollution of the Senate Public Works Comm., 92d Cong., 2d Sess., ser. 92-H 31 (1972), Pt. 1, at 246-249, 271-276. We note that it was that contemporaneous interpretation by EPA, rather than its subsequent actions in response to court orders, which is entitled to weight with the Court and to be accepted if it constitutes a "reasonable" interpretation of the Act, even if it is not the "only one" that EPA "permissibly could have adopted . . ." *Train v. Natural Resources Def. Council*, *supra* at 75.

Columbia contesting that position. That court rejected EPA's construction in this regard, ordered EPA to disapprove plans insofar as they did not "effectively prevent significant deterioration of existing air quality," and directed EPA to propose regulations for the inclusion in the plans of such significant deterioration provisions. *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D. D.C., 1972). The District of Columbia Circuit affirmed *per curiam* on the basis of the opinion below, 4 ERC 1815 (1972), and after granting a petition by the Government for writ of certiorari, this Court affirmed without opinion by an equally divided Court. *Fri v. Sierra Club*, 412 U.S. 541 (1973).⁶ Petitioners were not parties to that proceeding.

In response to that decision, EPA disapproved the implementation plans of every State insofar as they failed to provide for the prevention of significant deterioration (37 F.R. 23836); issued an initial notice of proposed rulemaking (38 F.R. 18985) and held public hearings at six locations (but not in every State); issued revised proposed regulations (39 F.R. 30999); and, on December 5, 1974, published its final significant deterioration regulations (39 F.R. 42509). In proposing such regulations, EPA stated that it did not regard the *Ruckelshaus* decision as "definitive" in view of this Court's equal division; and that EPA therefore "adheres to the view . . . that the Act does not require EPA or the States to prevent significant deterioration

⁶ Thus the only opinion in that case was that of District Judge Pratt. As was true of the court below in this case, he relied entirely upon the "protect and enhance" language of the Findings and Purposes section as the statutory basis for the decision, and sought to support his decision by reference to legislative history of the 1970 Amendments. 344 F. Supp., at 255-256.

of air quality," and was acting only because of "the preliminary injunction issued by the District Court" (39 F.R., at 18986).

In proposing and promulgating these regulations, EPA was faced with the fact that the courts in the *Ruckelshaus* case had not determined "what constitutes significant deterioration and exactly how it will be prevented" (39 F.R., at 18986). So, too, the "protect and enhance" statutory language and the legislative history relied upon similarly provided no guidance, except insofar as they might imply that all degradation of air (and thus all economic growth) should be prevented—which no one contended to have been contemplated by the Congress (39 F.R., at 18987). Furthermore, since the national ambient air standards are intended to prevent all "demonstrable or predictable adverse effects which can be quantitatively related to pollutant concentrations in the ambient air," EPA concluded that "significant deterioration must necessarily be defined without a direct quantitative relationship to specific adverse effects on public health and welfare" (39 F.R., at 18987). Hence, any judgment of what deterioration would be significant "must be essentially subjective" (39 F.R., at 18988), based upon "consideration of varying social, economic, and environmental factors" (39 F.R., at 31001), and "[a]ny policy to prevent significant deterioration involves difficult questions regarding how the land in any area is to be used" (*ibid.*).

The final regulations apply the significant deterioration provisions to two pollutants: particulate matter and sulfur dioxide. In view of the considerations outlined above (see 39 F.R., at 42510; App. B, at 55a), EPA established a system for classifying the lands within a State. In Class I areas, "practically any" in-

crease in the levels of those pollutants would be prohibited (and thus practically any economic growth); in Class II areas, somewhat larger increases in the levels of those pollutants would be allowed (but significantly less than would be allowed by the national standards) so that in EPA's judgment "moderate well-controlled growth" would be permissible; and in Class III areas, the level of those pollutants (and thus economic growth) could be increased up to the level allowed by the national standards (*ibid.*). However, the regulations prohibit the construction of a new source which "would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State;" accordingly, a power plant located in a Class II area might violate Class I restrictions in areas as much as "60 or more miles away" so that the effect of a more restrictive classification "extends well beyond" its "boundaries into the adjacent areas" (39 F.R., at 42512; App. B, at 66a-67a).

The regulations initially place all areas in Class II, because EPA "continues to feel that an initial Class II designation represents the most reasonable compromise between" the positions urged by industrial groups, on one hand, and environmental groups on the other hand (*ibid.*). They established a procedure to be administered by the individual States, subject to review by EPA, which is intended by EPA to allow such States "to reclassify any area to accommodate the social, economic, and environmental needs and desires of the public" (39 F.R., at 42510; App. B, at 55a). Such a reclassification cannot be approved, however, unless the State assumes EPA's obligation to implement the regulation's new source review requirements discussed below or receives a waiver from EPA in this regard (40

C.F.R. § 52.21(c)(3)(vi)(a), (f); App. B, at 81a-83a). In addition, Federal land managers and Indian governing bodies can reclassify Federal or Indian lands within their respective jurisdictions, subject to consultation with the State or States involved and review by EPA, but Federal land managers may only adopt a more restrictive classification (*i.e.*, Class I rather than Class III). See 39 F.R., at 42513; App. B, at 69a-70a). The restrictions upon increments of pollutants in the three classifications are implemented by review of proposed new stationary sources, construction of which is to be prohibited if such an increment will be violated even if the new source will use the best available technology as required by § 111 of the Clean Air Act. See 39 F.R., at 42510; App. B, at 55a.

C. The Proceedings Below

Some 14 separate petitions were filed in various courts of appeals to review the significant deterioration regulations, pursuant to § 307(b)(1) of the Act, 42 U.S.C. § 1857h-5(b)(1), most of which were filed by multiple parties. All those not filed in the District of Columbia Circuit were transferred thereto, and that court consolidated the cases for briefing and argument. The Court of Appeals upheld the validity of those regulations. Its August 2, 1976 opinion was written by Judge Wright, who was joined by Judge Robinson. Judge Wilkey "concur[red] in the result only" without writing a separate opinion (App. A, at 51a).

The Court of Appeals generally applied the "arbitrary and capricious" standard of the Administrative Procedure Act, which it deemed to require "that agency action be affirmed if a rational basis exists therefor" (App. A, at 15a). But in regard to the "question whether the Clean Air Act should be interpreted to pro-

hibit significant deterioration of air cleaner than the national standards," which "is necessarily the first level of analysis," the Court of Appeals "require[d] the clearest showing that *Sierra Club v. Ruckelshaus* was incorrectly decided, since Judge Pratt's decision was affirmed by both another panel of this court and an equally divided Supreme Court" (*id.*, at 16a-17a). Thus, the court below in effect rejected the approach followed by this Court, in *Train v. Natural Resources Def. Council*, *supra* at 74-75, under which EPA's initial interpretation of the Act, rather than revised regulations which it issued in conformity with prior court decisions to the contrary, was entitled to "accept[ance] by the reviewing courts" if "reasonable," even if it was not "the only one [EPA] permissibly could have adopted" ⁷ See n. 5, p. 11, *supra*.

After reconsidering the decision in *Sierra Club v. Ruckelshaus* under the standard of review thus enunciated, the Court of Appeals found "no substantial reason to question" its "continuing validity" (App. A, at 29a; generally, at 16a-29a). As we have noted, the only statutory basis asserted for the holding that the Clean Air Act requires the prevention of significant deterioration was the "protect and enhance" language in § 101(b) (1), setting forth one of the purposes of the Act (*id.*, at 17a-18a). The primary reliance of the court below, how-

⁷ The prior decisions involved in *Train* (by four courts of appeals) had not been affirmed by an evenly divided Supreme Court, but of course affirmances by an equally divided Court are without precedential effect. See, e.g., *Neil v. Biggers*, 409 U.S. 188, 190-92 (1972). Nonetheless, the Court of Appeals below was entitled to accord precedential effect to its own prior decision (if, as it concluded, subsequent decisions by this Court were not to the contrary), so that its approach may have been appropriate in that court even though it would not be appropriate in this Court.

ever, was placed upon certain legislative history of the 1970 Amendments (*id.*, at 18a-23a), which was thought to afford "every indication" that Congress intended in 1970 to continue a policy of prevention of significant deterioration of air quality (*id.*, at 23a). The Court of Appeals also thought that its interpretation was bolstered by "recent congressional statements" upon pending legislation (*id.*, at 23a), and by the acceptance of *Sierra Club v. Ruckelshaus* "in a number of other circuits" (*id.*, at 24a).⁸ And, it rejected contentions by these petitioners that the "shall approve" language in § 110(a)(2) of the Act, as interpreted and applied by decisions of this Court subsequent to *Sierra Club v. Ruckelshaus*, necessitated a contrary holding (*id.*, at 24a-27a).

In addition, the Court of Appeals rejected a number of contentions, some by environmentalists and some by industry petitioners, to the effect that the significant deterioration regulations are arbitrary and capricious or otherwise invalid, even assuming that the Clean Air Act requires prevention of significant deterioration (App. A, at 29a-48a).

With respect to such contentions by *Sierra Club*, the Court of Appeals held (1) that EPA's exclusion of four additional "pollutants which have an adverse effect on public health or welfare" (*id.*, at 29a) "was rational

⁸ We note that the significant deterioration issue had not been fully briefed in those cases. For example, one of those cases was the decision of the Fifth Circuit which was before this Court in *Train v. Natural Resources Def. Council*, *supra*. The petitioner's brief in the Fifth Circuit discussed the significant deterioration issue in a short two-page argument which simply asserted that the issue had been settled by *Sierra Club v. Ruckelshaus*, and EPA did not respond at all to that argument in its brief.

and based on consideration of the relevant factors" since EPA "does not have technology or modeling techniques rationally to regulate emissions [of those pollutants] on a case-by-case basis" (*id.*, at 31a; generally, at 29a-31a); (2) that the regulations were not invalid on the grounds that Class II and Class III allow significant deterioration and are based upon considerations other than air quality, since "it was a rational policy decision that the significance of the deterioration of air quality should be determined by a qualitative balancing of clean air considerations against the competing demands of economic growth, population expansion, and development of alternative sources of energy" (*id.*, at 33a; generally, at 32a-34a); and (3) that "[i]t was a rational policy decision to limit the instant regulations to prospective concerns only" (*id.*, at 35a) since "inclusion of the earlier construction would limit practical use of the regulations to regulate future development" (*id.*, at 35a; generally, at 34a-36a).⁹

With respect to the contentions by industry petitioners, the Court of Appeals held (1) that the regulations need not be related to anticipated adverse effects on public health or welfare, because "EPA has acted reasonably in permitting each state . . . to develop a workable definition of significant deterioration" based upon its "evaluation of the relative importance of the competing interests" (App. A, at 40a-41a; generally, at 39a-41a); (2) that the conceded inadequacy of the com-

⁹ In addition, the court below rejected contentions by Sierra Club that EPA erred in providing within its "significant deterioration" regulations for preconstruction review of new stationary sources using an industry-wide, rather than case-by-case, pollution control formula under the new source performance standards provided therein, where applicable, and in providing for such review with regard to only "significant", rather than all, new sources (App. A, at 35a-39a).

puter modeling techniques prescribed by the regulations "to predict with precision what effect a proposed new source will have on the ambient air, and therefore on the allowable increments for a given region" (*id.*, at 41a), was not "at this time . . . a substantial objection" (*id.*, at 42a), since the Court had "no basis on which to question EPA's judgment" that its "predictive techniques" "can be used in comparing the relative impact of a source" (*id.*, at 41a); and (3) that EPA was not required to follow the procedures prescribed in § 110 (c) of the Act in regard to the promulgation of regulations revising State implementation plans, since "the requirement of prevention of significant deterioration does not fit neatly into the statutory scheme, as it is not expressly included in Section 110 of the Act" (*id.*, at 44a; generally, at 42a-45a).¹⁰

The Court of Appeals did not decide the merits of a contention by industry petitioners that the regulations violated the Clean Air Act insofar as they authorized Federal land managers and the governing bodies of Indian Tribes to reclassify Federal and Indian lands. Rather, the court below held that that issue "is not yet ripe for review" (*id.*, at 47a; generally, at 45a-48a).

Finally, the Court of Appeals rejected contentions by industry petitioners that the Clean Air Act is unconstitutional, insofar as it may be held to authorize the significant deterioration regulations, on the grounds that the Act does not provide any standards or guidance

¹⁰ The court below did not directly address a contention by industry petitioners that all areas initially should be placed in Class III, or the reverse contention by Sierra Club that all areas initially should be placed in Class I, rather than in Class II. However, those contentions obviously were rejected when the regulations were upheld.

as to the manner or extent of the prevention of significant deterioration; that the significant deterioration regulations do not have any rational relationship to the public health or welfare; that the regulations so limit the use of privately owned (and also State owned) land as to constitute an unconstitutional taking; and that the regulations entrench upon powers reserved to the States (App. A, at 48a-50a).

D. Recent Attempts at Legislating a Specific Significant Deterioration Provision

Both the Senate and the House recently passed bills (S. 3219 and H.R. 10498, 94th Cong.) which, *inter alia*, would have amended the Clean Air Act so as to include detailed substantive provisions concerning the prevention of significant deterioration. The significant deterioration provisions contained in those bills differed substantially from each other, from the regulations promulgated by EPA, and from the recommendation of the President who urged that "the most appropriate course of action would be to amend the Act to preclude application of all significant deterioration provisions until sufficient information concerning final impact can be gathered" in view of their "potentially disastrous effects on unemployment and on energy development" ¹¹ A Conference committee reported a compromise provision. H. Rep. No. 94-1742, *reprinted at* 122 Cong. Rec. No. 150 (Pt. 2), at H 11959-94 (daily ed.); *see specifically* H 11970-73, 11987-88. But, the Conference bill failed of passage in both Houses prior to adjournment *sine die*.

¹¹ 122 Cong. Rec. No. 118, at S 13141 and S 13160-61 (identical letters from the President to the chairmen of the House and Senate committees which handled the pending bills) (daily ed.).

As the court below noted (App. A, at 23a), the committee reports on the bills contained statements to the effect that a "policy" of preventing significant deterioration was incorporated into the 1967 Air Quality Act by enactment of the "protect and enhance" purpose clause and was not altered by the 1970 Amendments. Similar statements were made during the debates by proponents of the significant deterioration provisions,¹² while opponents were equally clear that no such "policy" had ever been intended by the Congress.¹³

Moreover, even those who supported the view that such a "policy" was included within the "protect and enhance clause" conceded that the "Congress did not provide specific guidelines for a nondegradation pro-

¹² See 122 Cong. Rec. No. 112, at S 12480 (Sen. Muskie) (daily ed.); No. 114, at S 12701 (Sen. Tunney) (daily ed.); No. 115, at S 12781 (Sen. Buckley) (daily ed.); No. 118, at S 13182 (Sen. Eagleton) (daily ed.); No. 119, at H 8296, 8297 (Rep. Rogers), H 8303 (Rep. Heinz), and H 8332 (Rep. Bingham); No. 134, at H 9562 (Rep. Preyer) (daily ed.).

¹³ See H. Rep. No. 94-1175, 94th Cong., 2d Sess. (1976) at 445-446 (Rep. Satterfield) and 488-489 (Reps. Devine, Broyhill, Carter, Brown, Skubitz, Collins and McCollister); 122 Cong. Rec. No. 112, at S 12458 (Sen. Scott) (daily ed.); No. 118, at S 13140 (Sen. Moss), S 13152 (Sen. Fannin), S 13155 (Sen. Garn), S 13156 (Sen. Curtis), and S 13160 (Sen. Helms) (daily ed.); No. 119, at H 8297 (Rep. Broyhill), H 8298 and H 8306 (Rep. Satterfield) (daily ed.); No. 120, at S 13519 (Sen. Scott) (daily ed.); No. 134, at H 9559 (Rep. Satterfield), H 9566 (Rep. Hagedorn) (daily ed.). In addition, some of the proponents of the proposed provisions also conceded that it constituted a new program without any basis, even as to "policy," in the existing law. See S. Rep. No. 94-717, 94th Cong., 2d Sess. (1976), at 105 (Sen. Gravel) and 118 (Sen. McClure); 122 Cong. Rec. No. 112, at S 12469 (Sen. Gravel) (daily ed.); No. 118, at S 13164 (Sen. McClure) (daily ed.).

gram;"¹⁴ that the "question of exactly what constitutes significant deterioration had not been directly addressed by the Congress;"¹⁵ that the Clean Air Act "does not clearly spell out a nationally uniform process by which the air quality of clean air regions will be preserved;"¹⁶ and that, while the 1970 Amendments "gave careful consideration to the need for cleaning up dirty areas," that Act "largely overlooked the need to develop a clear and workable policy to protect our National's vast clean air regions."¹⁷ So, too, it was urged by proponents that the Congress has a Constitutional "responsibility to define national policy"¹⁸ and that "EPA's current regulations are simply not an adequate response to this problem."¹⁹ According to Senator Muskie, the Senate "committee unanimously agreed that the prevention of deterioration of clean areas should be resolved by the Congress and not by the courts."²⁰

Furthermore, it was agreed by proponents, as well as by opponents, that the significant deterioration issue

¹⁴ 122 Cong. Rec. No. 118, at S 13182 (Sen. Eagleton) (daily ed.).

¹⁵ 122 Cong. Rec. No. 112, at S 12459 (Sen. Randolph) (daily ed.).

¹⁶ 122 Cong. Rec. No. 119, at H 8296 (Rep. Rogers) (daily ed.).

¹⁷ 122 Cong. Rec. No. 114, at S 12701 (Sen. Tunney) (daily ed.).

¹⁸ S. Rep. No. 94-717, *supra* at 115 (Sens. Buckley and Stafford).

¹⁹ 122 Cong. Rec. No. 119, at S 13317 (Sen Muskie) (daily ed.).

²⁰ 122 Cong. Rec. No. 113, at S 12543 (daily ed.). Senator Muskie commented as follows during the floor debate about the conference compromise on significant deterioration: "Witnesses on both sides [, industry and environmentalists,] came to us and pleaded, 'Take this out of EPA's hands; take this out of the courts. Give us a clear policy so we shall know where we are going.'" 122 Cong. Rec. No. 151, at S 17533 (daily ed.).

is very important, complex and controversial, in view of its broad social and economic implications,²¹ so as to require thorough consideration by the Congress.²² H. Rep. No. 94-1175 devoted over 70 pages (pp. 4-7, 83-151) and S. Rep. No. 94-717 devoted 13 pages (pp. 3, 16-27) to the significant deterioration issue (exclusive of additional and dissenting views), and most of the lengthy floor debates on the bills and on the Conference compromise related to that issue despite the fact those bills contained other controversial provisions (such as those relating to automobile emissions).

In contrast, despite the assertions by some of the proponents of the recent legislation that the "protect

²¹ For example, Senator Muskie referred to that issue as being "the most difficult . . . which the committee was asked to resolve" (122 Cong. Rec. No. 112, at S 12479 (daily ed.)), approvingly quoted testimony that it "is far too significant an issue to be determined, as it has been thus far, on narrow legal grounds by the judiciary" with "economic and social implications . . . so broad that it cannot and should not be determined by an independent regulatory agency in a rulemaking proceeding" (*id.*, at S 12480), and described that issue as constituting "the most controversial aspect" of the pending legislation (*id.*, No. 113, at S 12543 (daily ed.)). The debates are peppered with generally similar comments by many other legislators.

²² See, e.g., H. Rep. No. 94-1175, *supra*, which states "that the issue of prevention of significant deterioration perhaps is unique in that it is one of the most carefully and completely studied issues to come before Congress in many years" (p. 149), refers to numerous hearings, studies and committee markup sessions relating to that issue (pp. 149-150), and notes that the committee's bill includes a requirement for a report by EPA within two years "on the progress in and any problems associated with carrying out" the significant deterioration provisions (p. 151). Much of the floor debate in both the House and the Senate was centered upon whether even further study of the issue should be had before enactment of significant deterioration provisions.

and enhance" purpose clause of the Clean Air Act was intended to embody a "policy" of preventing significant deterioration, there is no mention of such an intent or policy in the legislative history of the 1963 Act which first enacted the "protect" language or of the 1967 Air Quality Act which added the "enhance" language. See p. 7, *supra*. No member of Congress attributed such an intent or policy to the "protect and enhance clause" in the hearings, reports or debates that preceded enactment of the 1970 Amendments. See p. 35, *infra*. And, it indeed seems "inconceivable," as Senator McClure stated, "that the Congress would have made a major change in existing law using the 'Findings and Purposes' Section of the Act and without providing any guidance or explanation in the body of the Act." S. Rep. No. 94-717, *supra* at 118. Finally, when Congress undertook in the last Congress to deal explicitly with the significant deterioration issue, it did not put its reliance upon a general purpose clause, but spelled out substantive measures and detailed standards to deal with this complex and controversial issue.

REASONS FOR GRANTING THE WRIT

This Court already has recognized that it should review and decide the basic statutory issue of whether the Clean Air Act authorizes and requires EPA to amend State implementation plans so as to prevent significant deterioration of air in circumstances where the quality of the air will remain as good as or better than is required by national ambient air quality standards designed to avoid all known or anticipated adverse effects of air pollution upon the public health or welfare. While the grant of certiorari in *Sierra Club*

v. Ruckelshaus (409 U.S. 1124 (1973)) unfortunately did not result in a definitive resolution of that issue, because of the even division of the Court, the importance of and need for such a decision remains.

Indeed, the importance of reviewing and deciding this case may be even greater at this juncture because, if the Court should agree with the decision below on the basic statutory question, important and debatable issues would be presented as to what constitutes significant deterioration and how it can be prevented in a manner consistent with the Act and the Constitution. This is particularly true since EPA, when promulgating the regulations at issue, concededly found no guidance in the Clean Air Act or its legislative history (see p. 13, *supra*).²³ Plainly, regulations which utilize that Act to establish a mechanism for land use planning restricting future growth and development

²³ This Court has recently reaffirmed the principle that "a congressional delegation of power to a regulatory agency must be accompanied by discernible standards, so that the delegatee's action can be measured for its fidelity to the legislative will. See, e.g., *Yakus v. United States*, 321 U.S. 414 (1944); *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.C., 1971). Cf. *Federal Energy Administration v. Algonquin, SNG*, — U.S. —, [44 U.S.L.W. 4883] (1976)." *City of Eastlake v. Forest City Enterprises, Inc.*, — U.S. —, —, 44 U.S.L.W. 4919, 4921 (1976). As EPA conceded in promulgating its regulation, there are no discernible standards for "significant deterioration" within the "protect and enhance" clause—a point dismissed by the court below (App. A, at 50a) in two sentences. Indeed, if such a complex and controversial program can emanate from the term "protect and enhance," there is no limit to the types of air pollution measures that would be authorized by that clause. And, if "protect and enhance" language is that broad, one wonders why EPA ever needed any of the other specific legislative authority granted to it within the lengthy Clean Air Act.

of much of the country,²⁴ and which are unrelated to known or anticipated adverse effects from air pollution upon either the public health or public welfare, are very important as well as being of very questionable legality. As EPA stated in proposing its regulations (38 F.R. 18986), they "will have a substantial impact on the nature, extent, and location of future industrial, commercial, and residential development throughout the United States," and "could affect the utilization of the Nation's mineral resources, the availability of employment and housing in many areas, and the costs of producing and transporting electricity and manufactured goods."²⁵

We do not know, of course, why four members of this Court voted to affirm the decision below in *Sierra Club v. Ruckelshaus*, or the identity of those members. But whatever those reasons may have been at the time, we believe that the entire Court, after further consideration of the Clean Air Act in three subsequent cases, has construed that Act in a manner that is inconsistent with the decision in *Sierra Club v. Ruckelshaus* and the decision by the court below in this case with respect to the central issue of whether the Act requires EPA to disapprove State implementation plans and promulgate regulations so as to prevent significant deterioration. In view of the obvious importance of this case,

²⁴ According to S. Rep. No. 94-717, *supra* at 21, the "majority of the land mass of the United States has air quality cleaner than" is required by the national "ambient standards."

²⁵ The great importance of this case was recognized in the court below by *Sierra Club*, as well as by EPA and the industry petitioners. Both the President and the Congress have recognized, in connection with the legislation which failed of passage in the last Congress, the importance of whether and how significant deterioration is to be prevented (see pp. 20, 22-23, *supra*).

we see no need in this petition to demonstrate why the court below erred on other issues which were not involved in *Sierra Club v. Ruckelshaus*. We shall nevertheless indicate briefly our reasons for believing that the decision below is wrong on the basic issue of statutory construction.

It should be recalled, in appraising the significance of those three subsequent decisions by this Court, that § 110(a)(2) of the Clean Air Act in terms provides that EPA "shall approve" State implementation plans that comply with eight specified criteria or requirements; that § 110(a)(3)(A) in terms provides that EPA "shall approve" revisions of such State implementation plans that comply with those eight requirements; that § 110(c)(1) authorizes EPA to propose and promulgate regulations amending a State implementation plan only when the plan is not "in accordance with" those eight requirements; and that it has neither been contended nor held in this litigation that any of those eight criteria or requirements include the prevention of significant deterioration. See pp. 9-10, *supra*.

In *Train v. Natural Resources Def. Council*, 421 U.S. 60 (1975), the issue involved whether EPA was required, by § 110(a)(3)(A), to approve variances from emission limitations specified in State implementation plans as "revisions" of such plans. Those variances would permit more air pollution than otherwise would be permitted, but the implementation plan as so revised nonetheless would attain and maintain the national ambient air quality standards and otherwise comply with the eight requirements specified in § 110(a)(2). In holding that "the revision mechanism of

§ 110(a)(3) is available for the approval of those variances which do not compromise the basic statutory mandate that . . . the national primary ambient air standards be attained" (*id.*, at 99), this Court pointed out that under § 110(a)(3) "Agency approval is subject only to the condition that the revised plan satisfy the general requirements applicable to original implementation plans" (*id.*, at 80), and that (*id.*, at 79):

"Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 110(c)." (Emphasis by the Court.)

The only dissenter (without opinion) was Mr. Justice Douglas, and only Mr. Justice Powell did not participate in the decision (*id.*, at 99).

The Court's conclusion that the Act requires EPA to approve State implementation plans and revisions thereof which provide "for the timely attainment and subsequent maintenance of ambient air standards" and otherwise satisfy the eight requirements specified in § 110(a)(2) was reaffirmed in two later decisions. In *Hancock v. Train*, — U.S. —, 44 U.S.L.W. 4767 (1976), this Court, when deciding (over the dissent of Justices Stewart and Rehnquist (*id.*, 4777)) that § 118 does not require Federal installations to abide by the

permit requirements of State implementation plans, said (*id.*, at 4768): "EPA [is] required to approve each State's implementation plan as long as it was adopted after public hearings and satisfied the conditions specified in § 110(a)(2)." And, while holding in *Union Electric Company v. Environmental Protection Agency*, — U.S. —, 44 U.S.L.W. 5060 (1976), that courts may not review and overturn EPA's approval of a State implementation plan on the basis of "claims of economic and technological infeasibility" since EPA itself cannot "consider such claims in approving or rejecting a state implementation plan" (*id.*, at 5063; generally, at 5063-5065), this Court pointed out that § 110(a)(2):

"... sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator 'shall approve' the proposed state plan. *The mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified, Train v. NRDC*, 421 U.S., at 71 n. 11, 79, and none of the eight factors appears to permit consideration of technological or economic infeasibility. Nonetheless, *if a basis is to be found for allowing the Administrator to consider such claims, it must be among the eight criteria*, and so it is here that the argument is focused." (Emphasis added.)

All members of the Court joined in that opinion. And, we repeat, no one in this litigation has contended—and the court below did not hold—that there is a "basis" for requiring State plans to provide for the prevention of significant deterioration "among the eight criteria" specified in § 110(a)(2).

The court below rejected this Court's interpretation of § 110(a)(2) as mandating approval by EPA of State implementation plans that satisfy the eight requirements specified therein, regardless of other considerations, on the ground that the *Train* and *Union Electric* cases "did not consider the issue of non-deterioration" or "the significant deterioration of air cleaner than the national standards" (App. A, at 26a, 27a). As a matter of fact, however, *Train* was not concerned only "with air pollution below [*i.e.*, dirtier than] national standards" (App. A, at 26a). It also involved variances which would permit cleaner air to deteriorate to the level of the national standards.²⁶ In any event, this Court's acceptance in *Hancock* and *Union Electric* of the conclusion in *Train* that the "shall approve" language is mandatory, and the application of that interpretation to completely different factual situations, demonstrate that the Court intended it to apply generally to situations in which EPA's approval of (or disapproval and promulgation of amendments to) State implementation plans is involved. The Court did not make any exception for plans that fail to provide for the prevention of

²⁶ This Court expressly noted that treating variances as revisions under § 110(a)(3) "would result in variances being readily approved in two situations: first, where the variance does not defer compliance beyond the attainment date; and second, where the national standards have been attained and the variance is not so great that a plan incorporating it could not insure their continued maintenance." 421 U.S., at 77. (Emphasis added.) The first situation is the one identified by Judge Wright for the court below, while the second situation is the one in which deterioration of cleaner air to the level of the national standards would be permitted by approval of a variance.

significant deterioration, or even reserve that situation,²⁷ and no exception is made in § 110 itself.

While the court below conceded that "the provisions of Section 110(a) are, more than anything else, a summary of the mandatory requirements for all state implementation plans," it "found no indication . . . in the legislative history, that Section 110 was intended in any way to vitiate the non-deterioration mandate contained in the Senate report" (App. A, at 21a). In short, a passage in the Senate Report upon the 1970 Amendments constitutes the primary basis of the holding below that the prevention of significant deterioration also is a mandatory requirement for all State implementation plans, despite the omission of any such requirement from § 110, despite the mandatory "shall approve" language of § 110, and despite the holdings by this Court in *Train*, *Hancock*, and *Union Electric* that such language is truly mandatory. Indeed, that passage is the *only* bit of legislative history, from the enactment of the "protect" language by the 1963 Act through enactment of the "enhance" language by the 1967 Act and up to and including enactment of the 1970 Amendments, in which it is even claimed, by the court below or by any litigant, that any member of Congress has expressed the view that the

²⁷ This Court hardly could have been unaware of the significant deterioration issue since the opinion of the Fifth Circuit before the Court in *Train* and the opinion of the Eighth Circuit before the Court in *Union Electric* are among those that uncritically accepted *Sierra Club v. Ruckelshaus* as establishing a requirement for the prevention of significant deterioration. See 489 F.2d 390, 408 (5th Cir., 1974), and 515 F.2d 206, 220 (8th Cir., 1975). And see n. 8, p. 17, *supra*.

“protect and enhance” purpose clause requires the prevention of significant deterioration.²⁸

That passage in S. Rep. No. 91-1196, 91st Cong., 2d Sess. (1970), at 11, reads as follows:

“The bill would not require the attainment of the air quality goals within a specified time period. Nevertheless, it is the Committee’s view that progress in this direction should be made as rapidly as possible. In areas where air pollution levels already are relatively low, the attainment and maintenance of these goals should not require an extended time period. *In areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air*

²⁸ But see n. 2, p. 7, *supra*. While we are prepared to demonstrate that an HEW “Guidelines” issued under the 1967 Act (see App. A, n. 30, p. 18a) and testimony by officials of HEW (see *id.*, at 18a-19a) are consistent with our view that the 1967 Act was not intended to prevent deterioration of air which satisfied the air quality standards established thereunder, it does not seem necessary to do so in this petition. The court below recognized that the contrary “administrative interpretation” of the 1967 Act which it drew from those materials depended for its importance, in interpreting the 1970 Amendments, upon that court’s understanding that the “committee reports (sic)” on the 1970 Amendments “contain express language that the principle of non-deterioration was preserved by the Clean Air Act Amendments of 1970” (App. A, at 22a; generally, at 21a-22a). Insofar as the court below relied upon “recent congressional statements” in connection with legislation which failed of passage in the 94th Congress (*id.*, at 23a), we have noted that there were also many such statements to the contrary in that Congress (p. 21, *supra*), and the fact that Congress felt the need to draft an explicit significant deterioration provision demonstrates in and of itself the insubstantiality of any reliance upon the “protect and enhance” clause as a basis for supporting the nondeterioration doctrine.

quality. Once such national goals are established, deterioration of air quality should not be permitted except under circumstances where there is no available alternative. Given the varying alternative means of preventing and controlling air pollution—including the use of the best available control technology, industrial processes, and operating practices—and care in the selection of sites for new sources, land use planning and traffic control—deterioration need not occur.” (Emphasis added.)

We will content ourselves at this time with the following brief observations about that passage:

(1) The emphasized language in itself is ambiguous. It could mean one of two things: first, air that is “already equal to, or better than, the air quality goals” (*i.e.*, the national secondary standards)²⁹ should be maintained at a level that is either equal to or better than the national standards (*i.e.*, at a level which satisfies those standards) unless there is no available alternative; or, second, air that is “better than” should be maintained at a level which is better than, and air that is “equal to” should be maintained at a level that is “equal to” the national standards, unless there is no available alternative.

(2) The second interpretation proves too much, insofar as the significant deterioration regulations are concerned, as it would not permit any deterioration except where there “is no available alternative.” This reading would not permit “incremental” deterioration in any of the classes or the possibility of a Class III redesignation where deterioration down to federal

²⁹ Among other things, the bill that was enacted substituted the term “secondary ambient air quality standards” for the term “national goals” which was used in the Senate bill.

standards is contemplated by the present regulations. See pp. 13-14, *supra*.

(3) The entire context of the above-quoted passage indicates that the first interpretation—air quality that is equal to or better than the federal standards should be maintained at a level which is either equal to or better than such standards—was intended. The passage as a whole is directed to and elaborates upon “the Committee’s view that,” while the “bill would not require the attainment of air quality goals within a specified time period,” nonetheless “progress in this direction should be made as rapidly as possible.” Further, that passage appears in a section (pp. 9-11) devoted to the establishment of the national primary and secondary standards or goals at levels sufficient to protect the public health and welfare. The provisions of the bill relating to implementation plans are discussed in another section of the Report (pp. 11-15), which states, among other things, that the “bill . . . would require that each State . . . adopt a plan for the *implementation of standards at least as stringent as the national ambient air quality standards*” (p. 12; emphasis added), and that the Secretary of HEW³⁰ would have “the authority to replace all or any portion of any implementation plan submitted by a State *where the attainment of the nationally [sic] ambient air quality standard within the time required is not provided*” (p. 14; emphasis added). See, also, the analysis at pp. 54-59 of the Report of § 6 of the Senate bill (which contained the provisions in question).

³⁰ While the Senate bill provided for the Secretary of HEW to exercise the Federal functions provided for therein, the bill enacted in 1970 provided that the Administrator of EPA would exercise those functions.

(4) The passage in question, whatever its meaning, does not purport to be based upon, or even refer to, the “protect and enhance” purpose clause in § 101 (b)(1) of the Act. Insofar as we are aware, no member of Congress ever asserted, until after *Sierra Club v. Ruckelshaus* was instituted, that that clause embodied a policy to prevent significant deterioration.

(5) The passage in question comprises one paragraph (about one-fourth of a page) of a Senate Report that is 129 pages long. No one has even claimed that there is a comparable passage in H. Rep. No. 91-1146, 91st Cong., 2d Sess. (1970), or in the Conference Report, H. Rep. No. 91-1783, 91st Cong., 2d Sess. (1970), or in the extensive floor debates that preceded enactment of the 1970 Amendments. When this is contrasted with the lengthy discussion of the significant deterioration provisions of the legislation proposed in the immediately past Congress, both in committee reports and floor debate, and the general recognition of the complexity, controversial nature and importance of any such provisions (see pp. 20-24, *supra*), it seems inconceivable that the Congress could have intended State implementation plans to contain such provisions when it enacted the 1970 Amendments.

In view of the considerations outlined above, we think it plain that a single passage in a committee report, which in itself is at least ambiguous, is much too slim (if not nonexistent as) a foundation to support the superstructure of the significant deterioration regulations, overriding not only the plain language of § 110 of the Act but also three decisions by this Court holding that such language does indeed mean what it clearly says.

We add two further points. First, assuming that the "protect and enhance" language in the Findings and Purposes section of the Clean Air Act does embody a policy for the prevention of significant deterioration, this does not necessarily mean (as the court below seems to have assumed) that the implementation of such a policy is a function of the Federal Government. Rather, as we have demonstrated (p. 6, *supra*) and as the Court noted in *Train* (421 U.S., at 64), at all times the Clean Air Act has recognized, as it now provides in the Findings and Purposes section (§ 101(a)(3)), that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments" In this regard, § 116 of the Clean Air Act as revised by the 1970 Amendments provides, in the language of S. Rep. No. 91-1196, *supra* at 15, that "States, localities . . . may adopt . . . more restrictive standards and plans . . . than required by" what is now § 110 of the Act.

Second, even assuming that the "protect and enhance" language does include both a policy of preventing significant deterioration and a Federal role in that regard, this does not necessarily mean (as the court below seems to have assumed) that such Federal role is to be exercised through EPA's disapproval of State implementation plans and promulgation of regulations amending all those plans to include significant deterioration provisions. Indeed, the Congress in the 1970 Amendments did enact the provisions in § 111 of the Act for the establishment by EPA of new source performance standards (see p. 9, *supra*) in the belief, as stated in S. Rep. No. 91-1196, *supra* at 2, that "[m]aintenance of existing high quality air is assured through provision for maximum control of

new major pollution sources." And, see, *e.g.*, *National Asphalt Pavement Association v. Train*, 9 ERC 1109, 1114 (D.C. Cir., July 21, 1976), and the legislative history there cited.

In sum, the decision below has decided important issues that should be reviewed and decided by this Court, and it has decided them wrongly.

CONCLUSION

For the reasons stated above, this petition for writ of certiorari should be granted.

Respectfully submitted,

Dated: October 15, 1976

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-2063

SIERRA CLUB, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,
Respondents
THE DAYTON POWER & LIGHT CO. ET AL., *Intervenors*

No. 74-2079

SIERRA CLUB ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,
Respondents

No. 75-1368

PUBLIC SERVICE COMPANY OF COLORADO ET AL.,
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent
SIERRA CLUB ET AL., *Intervenors*

(1a)

2a

No. 75-1369

UTAH POWER & LIGHT COMPANY, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1370

STATE OF NEW MEXICO EX REL. NEW MEXICO
ENVIRONMENTAL IMPROVEMENT AGENCY, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1371

PACIFIC COAL GASIFICATION COMPANY ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1372

UTAH INTERNATIONAL, INC., *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

3a

No. 75-1575

INDIANA-KENTUCKY ELECTRIC CORPORATION ET AL.,
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent
SIERRA CLUB ET AL., *Intervenors*

No. 75-1663

THE DAYTON POWER & LIGHT COMPANY ET AL.,
Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1664

BUCKEYE POWER, INC. ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,
Respondents
SIERRA CLUB ET AL., *Intervenors*

No. 75-1665

AMERICAN PETROLEUM INSTITUTE ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

4a

No. 75-1666

ALABAMA POWER COMPANY ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1763

MONTANA POWER COMPANY ET AL., *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent
SIERRA CLUB ET AL., *Intervenors*

No. 75-1764

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
AND POWER DISTRICT ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,
Respondents
SIERRA CLUB ET AL., *Intervenors*

Petitions for Review of Regulations Promulgated by
the Environmental Protection Agency

Argued June 9, 1976

Decided August 2, 1976

5a

Before WRIGHT, ROBINSON, and WILKEY, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge WRIGHT*.

WRIGHT, *Circuit Judge*:

I. INTRODUCTION

One of the primary purposes of the Clean Air Act, 42 U.S.C. § 1857 *et seq.* (1970), is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population * * *." Section 101(b)(1), 42 U.S.C. § 1857(b)(1). Pursuant to the court order in *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253 (D. D.C. 1972), *aff'd per curiam*, 4 ERC 1815 (D.C. Cir. 1972), *aff'd by an equally divided Court, sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973), the Administrator of the Environmental Protection Agency (EPA) promulgated regulations designed to prevent "significant deterioration" of air quality in those areas which have air that already is cleaner than the national ambient air quality standards.¹ The regulations

¹ The twin objectives of the Clean Air Act are to improve air quality where pollution levels do not meet national minimum standards, and to protect the quality of air that already, as in this case, is cleaner than national standards. See Part V-A of this opinion *infra*. Accomplishment of those objectives is to be a joint enterprise of the federal government and the states, the former providing informed guidance to the implementation efforts of the latter. See §§ 101(a)(3), (4) of the Act, 42 U.S.C. §§ 1857(a)(3), (4).

Section 108 of the Act, 42 U.S.C. § 1857c-3, required the Administrator of EPA to publish a list of air pollutants which have "an adverse effect on public health or welfare." The Administrator was then to promulgate national primary and secondary ambient air quality standards for those specified pollutants. National *primary* air quality standards are those "the attainment and maintenance of which * * * are requisite to protect the public health"; national *secondary* standards are those "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." Section 109,

[continued]

employ a classification scheme under which these "clean air" regions may be designated Class I, II, or III. All such areas initially are designated Class II, under which specified increments in sulfur dioxide and particulate matter pollution are considered "insignificant." A state, In-

42 U.S.C. § 1857e-4. The Administrator has promulgated national primary and secondary air quality standards for six pollutants: sulfur dioxide, particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons, and nitrogen dioxide. 40 C.F.R. §§ 50.4—50.11 (1975).

The states are charged with the duty to develop implementation plans designed to achieve the level of air quality prescribed by the national primary and secondary standards:

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

Section 107, 42 U.S.C. § 1857e-2. The plans are submitted to the Administrator for approval under the provisions of § 110 of the Act, 42 U.S.C. § 1857e-5 (1970), *as amended* (Supp. IV 1974). A proposed implementation plan must satisfy the requirements of § 110(a)(2)(A)-(H), 42 U.S.C. § 1857e-5(a)(2)(A)-(H), which requirements include attainment of the national primary standards within three years after approval of the plan, and attainment of the secondary standards within a "reasonable time." Section 110(a)(2)(A), 42 U.S.C. § 1857e-5(a)(2)(A).

Section 110 also provides that the Administrator is promptly to prepare and publish his own regulations for a state if (a) it fails to submit a plan, (b) the plan "is determined by the Administrator not to be in accordance with the requirements of this section," or (c) the state fails to revise its plan pursuant to a provision required by § 110(a)(2)(H). Section 110(e)(1), 42 U.S.C. § 1857e-5(e)(1) (Supp. IV 1974). Subsection (e)(1) of § 110 also contains a conditional hearing requirement for these "replacement" implementation plans: "If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation." Subsection (a)(2)(H) requires that an imple-

dian territory, or federal land may be redesignated after hearing and by application to EPA. Designation as Class I implies a region of very clean air, in which relatively small increments in air pollution would be considered significant deterioration; Class III areas are those in which deterioration of air quality to the national ambient air quality standards would be considered insignificant.

The court has heard the regulations attacked from several perspectives. Petitioner Sierra Club contends that the regulations fail, in a variety of ways, to prevent significant deterioration of existing clean air. The States of New Mexico, Wyoming, and California² agree in some respects with Sierra Club, but are concerned that the regulations infringe on the general regulatory authority vested in the states by the Clean Air Act. A large number of electric power companies and industrial organizations have argued that the regulations are not authorized by the Clean Air Act, that their promulgation was procedurally defective, that the allowable increments are arbitrary and capricious, and that the regulatory structure created by the regulations is unconstitutional.

mentation plan provide for revision (i) to take account of changes in either technology or the national standards and (ii) whenever the Administrator determines that the plan is inadequate to achieve the primary or secondary standards.

The basic structure described above is supplemented by § 111 of the Act, 42 U.S.C. § 1857e-6 (1970), *as amended* (Supp. IV 1974), which provides for promulgation of "standards of performance" for emission limitations of significant new sources of pollution, by categories of sources. The standards must reflect "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated."

² The three named states are joined by Maine, Alabama, Colorado, Kansas, Minnesota, South Dakota, and Florida.

We conclude that the Administrator's action is rationally based and has not been shown to be either without his authority or unconstitutional. We therefore do not disturb the regulations as promulgated.

II. LITIGATION HISTORY

Suit was filed in May 1972 by the Sierra Club and other environmental protection groups for a declaratory judgment that the Clean Air Act prohibited approval of state implementation plans which permitted significant deterioration of air cleaner than the national secondary standards, and for injunctive relief to prevent the Administrator from approving those portions of state implementation plans which would permit significant deterioration. District Judge John H. Pratt granted plaintiffs' motion for a preliminary injunction and declared invalid an EPA regulation³ which had required only that state implementation plans "be adequate to prevent * * * ambient pollution levels from exceeding * * * [the applicable] secondary standard." *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253 (D. D.C. 1972). The Administrator was enjoined from approving any state plan "unless he approves the state plan subject to subsequent review by him to insure that it does not permit significant deterioration of existing air quality in any portion of any state where the existing air quality is better than one or more of the secondary standards promulgated by the Administrator."⁴

As is apparent from the provisions of the Clean Air Act outlined above,⁵ prohibition of significant deteriora-

³ 40 C.F.R. § 51.12(b) (1975).

⁴ *Sierra Club v. Ruckelshaus*, Civil Action No. 1031-72 (D. D.C. May 30, 1972), JA Vol. IV at 1487.

⁵ See note 1 *supra*.

tion of air cleaner than the national standards is not an express requirement of the Act. Judge Pratt based his decision, rather, on the "protect and enhance" language of Section 101(b)(1) of the Act and on the legislative history of both the Clean Air Act of 1970 and the Air Quality Act of 1967.⁶ The decision was affirmed *per curiam* by this court, 4 E.R.C. 1815 (1972), and was affirmed by an equally divided Supreme Court, *sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973).

Pursuant to that order, the Administrator reviewed and disapproved all state plans insofar as they failed to provide for prevention of significant deterioration. 37 Fed. Reg. 22836 (November 9, 1971). Four alternative sets of regulations were proposed for public comment, in an effort to determine what meaning to give the concept of "significant deterioration."⁷ Final regulations were pub-

⁶ The legislative history is discussed at notes 32-38 *infra*.

⁷ 38 Fed. Reg. 18986 (July 16, 1973). In proposing alternative solutions, EPA posed for public debate the problem of how significant deterioration was to be defined:

The basis for preventing significant deterioration * * * lies in a desire to protect aesthetic, scenic, and recreational values, particularly in rural areas, and in concern that some air pollutants may have adverse effects that have not been documented in such a way as to permit their consideration in the formation of national ambient air quality scientific data on the kind and extent of adverse effects of air pollution levels below the secondary standards, significant deterioration must necessarily be defined without a direct quantitative relationship to specific adverse effects on public health and welfare.

* * *

The relative significance of air quality versus economic growth may be a variable dependent upon regional conditions. For example, relatively minor deterioration of the aesthetic quality of the air may be very significant in a recreational area in which great pride (and economic development) is derived from the "clean air." Conversely, in areas with severe unemployment and little recreational value, the same level of de-

[continued]

lished December 5, 1974, 39 Fed. Reg. 42509, and were amended slightly on January 16, 1975 (40 Fed. Reg. 2802), June 12, 1975 (40 Fed. Reg. 25004), and September 10, 1975 (40 Fed. Reg. 42011).

III. THE REGULATIONS

In promulgating final regulations⁸ EPA was concerned primarily with the meaning of "significant deterioration." As it stated in the discussion preceding the new regulations:

Most of the comments implicitly recognized that there is a need to develop resources in presently clean areas of the country, and that significant deterioration regulations should not preclude all growth, but should ensure that growth occurs in an environmentally acceptable manner. However, there are some areas, such as national parks, where any deterioration would probably be viewed as significant. A single nationwide deterioration increment would not be able to accommodate these two situations.

39 Fed. Reg. at 42520. The solution was to prescribe, for those areas with air cleaner than the national standards, three classes of allowable total increments above the levels of particulate matter and sulfur dioxide pollution as of January 1, 1975, with the intention that each area could

teriation might very well be considered "insignificant" in comparison to the favorable impact of new industrial growth with resultant employment and other economic opportunities. Accordingly, the definition of what constitutes significant deterioration must be accomplished in a manner to minimize the imposition of inequitable regulations on different segments of the Nation.

Id. at 18987, 18988.

⁸ "Prevention of Significant Air Quality Deterioration," 39 Fed. Reg. 42510 (Dec. 5, 1974).

determine which class would prevent significant deterioration of its air in light of the area's air quality and social and economic needs and objectives:

Class I applie[s] to areas in which practically any change in air quality would be considered significant; Class II applie[s] to areas in which deterioration normally accompanying moderate well-controlled growth would be considered insignificant; and Class III applie[s] to those areas in which deterioration up to the national standards would be considered insignificant.

* * *

Since the consideration of "air quality factors" alone essentially leads to an arbitrary definition of what is "significant," this term only has meaning when the economic and social implications are analyzed and considered. Therefore, the Administrator believes that it is most important to recognize and consider these implications, since the consideration of air quality factors alone provides no basis for selecting one deterioration increment over another.

Id. The regulations, 40 C.F.R. §§ 52.01(d), (f), and 52.21 (1975), were promulgated as amendments to the disapproved state implementation plans.⁹

All areas initially are designated Class II,¹⁰ and may be redesignated by proposal of a state, federal land manager,

⁹ Part 52 of 40 C.F.R. "sets forth the Administrator's approval and disapproval of State plans and the Administrator's promulgation of such plans or portions thereof." 40 C.F.R. § 52.02(a) (1975). Each state implementation plan has been amended to incorporate by reference the new regulations. *See, e.g.*, 40 C.F.R. §§ 52.96 (Alaska), 52.144 (Arizona), 52.181 (Arkansas).

¹⁰ 40 C.F.R. § 52.21(c)(3)(i) (1975).

or Indian governing body where the state has not assumed jurisdiction over Indian lands.¹¹ Federal land may be designated only to a more restrictive classification than that provided by the state(s) in which it is located.¹²

A state may redesignate if a hearing is held after notice to states, federal land managers, and Indian governing bodies that may be affected,¹³ and if the proposed redesignation is based on the record of the hearing,

which must reflect the basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the areas being proposed for redesignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interests.¹⁴

A redesignation is to be approved if the state has complied with the listed requirements, has not "arbitrarily and capriciously disregarded" the considerations listed in the passage quoted above, and has undertaken the new source review requirements of Sections 52.21(d) and (e), discussed below.¹⁵ 40 C.F.R. § 52.21(e)(3)(vi)(a) (1975).¹⁶

¹¹ 40 C.F.R. §§ 52.21(e)(3)(ii), (iii), (iv), (v) (1975).

¹² 40 C.F.R. § 52.21(e)(iv) (1975).

¹³ 40 C.F.R. §§ 52.21(e)(3)(ii)(a)-(c) (1975).

¹⁴ 40 C.F.R. § 52.21(e)(3)(ii)(d) (1975).

¹⁵ See discussion at notes 20-23 *infra*.

¹⁶ In the event of a protest by a state or Indian governing body to a redesignation proposed by another state, federal land manager, or Indian governing body, the Administrator may approve the proposal "only if he determines that in his judgment the redesignation appropriately balances considerations of growth anticipated in the area proposed to be redesignated; the social, environmental and

Federal land managers and Indian governing bodies are subject to requirements parallel to those imposed on the states, with the added requirement that they consult with the state(s) in which they are located.¹⁷

If an area is designated as Class I or II, the allowable incremental pollution is measured from January 1, 1975.¹⁸ No increments are specified for Class III; areas so designated are required to meet only the national secondary standards.¹⁹

Enforcement of the limitation on incremental pollution is accomplished partly through preconstruction review of 19 categories of stationary sources considered to be significant sources of pollution.²⁰ Permission to construct or to modify significantly one of the listed stationary sources is conditioned on a showing that the source's emissions, together with all other increases or decreases in emissions in the area since January 1, 1975, will not violate the air

economic effects of such redesignation upon the area being redesignated and upon other areas and States; and any impacts upon regional or national interests." 40 C.F.R. § 52.21(e)(3)(vi)(e) (1975).

¹⁷ 40 C.F.R. §§ 52.21(e)(3)(iv), (v) (1975).

¹⁸ 40 C.F.R. § 52.21(e)(2)(i) (1975). The increments are prescribed in the following table, included in the cited subsection:

Pollutant	Class I (ug/m ³)	Class II
Particulate matter:		
Annual geometric mean	5	10
24-hr. maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hr. maximum	5	100
3-hr. maximum	25	700

¹⁹ 40 C.F.R. § 52.21(e)(2)(ii) (1975).

²⁰ 40 C.F.R. § 52.21(d)(1)(i)-(xix) (1975).

quality increments applicable to *any* area.²¹ The source also must meet an emission limit, specified by the Administrator, "which represents that level of emission reduction which would be achieved by the application of best available control technology, as defined in § 52.01(f), for particulate matter and sulfur dioxide."²² Preconstruction review of new proposed sources will be conducted by the Administrator or, by delegation, by the individual states.²³

Last, it should be noted that the described classification scheme is no procrustean bed to which all states are to be bound. The states retain the option of proposing an alternative method of preventing significant deterioration of air quality, thereby abandoning the regulatory framework described by the regulations under review. As EPA stated in proposing regulations:

The State plans need not be identical to the regulations proposed herein, but should be developed to accommodate more appropriately individual conditions and procedures unique to specific State and local areas. States are urged to develop and submit individual plans as revisions to State Implementation Plans as soon as possible. When individual State Im-

²¹ 40 C.F.R. § 52.21(d)(2)(i) (1975), *as amended*, 40 Fed. Reg. 42011 (Sept. 10, 1975).

²² 40 C.F.R. § 52.21(d)(2)(ii) (1975). "Best available control technology" is defined as equivalent to the new source performance standards promulgated under § 111 of the Clean Air Act, 42 U.S.C. § 1857c-6. *See* discussion at note 1 *supra*. If no standard of performance has been promulgated for a source, best available control technology is determined on a case-by-case basis. 40 C.F.R. § 52.01(f) (1975).

²³ 40 C.F.R. § 52.21(f) (1975). *See also* 40 C.F.R. § 52.21(d)(4) (1975), which provides for cooperation between the Administrator and federal land managers for review of new sources on federal land, and between the Administrator and the Secretary of the Interior as to lands over which a state has not assumed jurisdiction.

plementation Plan revisions are approved as adequate to prevent significant deterioration of air quality, the applicability of the regulations proposed herein will be withdrawn for that State.

39 Fed. Reg. at 31000 (August 27, 1974).

IV. STANDARD OF REVIEW

It is well settled that EPA rulemaking is reviewed under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 706(2) (A)-(D) (1970). *Ethyl Corp. v. EPA*, — U.S. App.D.C. —, —, — F.2d —, —, slip op. at 66-74 (No. 73-2205, decided March 19, 1976). We must determine whether the Agency's action, findings, and conclusions are invalid as procedurally defective (§ 706(2) (D)), in excess of legislative authority (§ 706(2) (C)), unconstitutional (§ 706(2) (B)), or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (§ 706(2) (A)).

The "arbitrary and capricious" standard requires that agency action be affirmed if a rational basis exists therefor²⁴; it is not for us to inquire into whether the decision is wise as a matter of policy, for that is left to the discretion and developed expertise of the agency.²⁵ The Supreme Court has cautioned, with respect to review under the "arbitrary and capricious" standard, that the reviewing court is limited to deciding whether there has been a "clear error of judgment * * *". Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to*

²⁴ *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974).

²⁵ *National Ass'n of Food Chains, Inc. v. ICC*, — U.S. App. D.C. —, —, — F.2d —, —, slip op. at 13 (No. 75-1471, decided May 18, 1976) (*per curiam*).

Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1972). See *Ethyl Corp. v. EPA*, *supra*, — U.S.App.D.C. at — n.74, — F.2d at — n.74, slip op. at 69 n.74.

We therefore must assure ourselves that the Agency has presented a rational basis for its decision²⁶; that it “demonstrably has given reasoned consideration to the issues, and has reached a result which rationally flows from its conclusions.”²⁷

V. ARGUMENT

A. Should *Sierra Club v. Ruckelshaus* be rejected on further consideration?

The question whether the Clean Air Act should be interpreted to prohibit significant deterioration of air cleaner than the national standards is necessarily the first level of analysis. Although this issue was decided by the earlier *Sierra Club v. Ruckelshaus* litigation, it is contended by the industrial petitioners (1) that the decision was clearly wrong on the merits and should be reconsidered and (2) that the later decision in *Train v. NRDC*, 421 U.S. 60 (1975), and enactment of the Energy Supply and Environmental Coordination Act of 1974, 88 STAT. 246, are inconsistent with the prior decision in *Sierra Club v. Ruckelshaus*.

The first argument obviously would require the clearest showing that *Sierra Club v. Ruckelshaus* was incorrect—

²⁶ We note that the basis of agency action must be provided by the agency; an order “cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding . . .” *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); see *National Ass’n of Food Chains, Inc. v. ICC*, *supra* note 25, — U.S.App.D.C. at —, — F.2d at —, slip op. at 12-13.

²⁷ *National Ass’n of Food Chains, Inc. v. ICC*, *supra* note 25, — U.S.App.D.C. at —, — F.2d at —, slip op. at 14.

ly decided, since Judge Pratt’s decision was affirmed by both another panel of this court and an equally divided Supreme Court. It is posited that neither the “protect and enhance” language of Section 101(b)(1) nor the legislative history of the Clean Air Act need be read to impose a requirement of nondeterioration; petitioners then point out that, to the contrary, a 1970 amendment to the Act, Section 110(a)(2), 42 U.S.C. § 1857c-5(a)(2), states that the Administrator “shall approve” a state implementation plan which meets the criteria listed in that section, none of which implies a nondeterioration standard. The conclusion advanced by petitioners is that the judicially-created requirement of nondeterioration violates this plain language of the 1970 amendment.

When a specific provision of a total statutory scheme reasonably may be construed to be in conflict with the congressional purpose expressed in the act, our first task is to examine the act’s legislative history to determine whether the specific provision is reconcilable and consistent with the intent of Congress.²⁸ We find, in the legislative history of the Clean Air Act of 1970, a clear understanding that the Act embodied a pre-existing policy of nondeterioration of air cleaner than the national standards. Inasmuch as we find no support for the proposition that the addition of Section 110(a)(2) was intended to limit that policy in any way, we reaffirm our prior holding in *Sierra Club v. Ruckelshaus*.

The “protect and enhance” language of the Clear Air Act was added by the Air Quality Act of 1967, 81 STAT. 485.²⁹ The administrative interpretation and, to a lesser

²⁸ See *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968): “[W]e cannot, in the absence of an unmistakable directive, construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate.”

²⁹ *Air Quality Act of 1967*, S. Rep. No. 91-403, 90th Cong., 1st Sess. 40 (1967).

degree, the legislative history of the Air Quality Act expressed a policy of nondeterioration,³⁰ and that policy appears generally to have been accepted at the time of the addition of the Clean Air Act amendments of 1970.

In the Senate hearings on the Clean Air Act amendments of 1970, the officials charged with implementation of the 1967 Act expressed their clear understanding that the "protect and enhance" language of Section 101 mandated the policy of nondeterioration. HEW Secretary Robert H. Finch testified as follows in a statement presented by Undersecretary John Veneman:

In their implementation plans, the States would have to spell out the measures to be taken to achieve

³⁰ *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253, 255 (D. D.C. 1972); ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW, 1974 at 1077-1080. The Senate committee report on the Air Quality Act emphasized that the Act would apply to all areas of the country, and quoted Senator Muskie for the proposition that it was necessary "to assure the lessening of current levels of pollution and to prevent further environmental deterioration in the future." *Air Quality Act of 1967*, *supra* note 29, at 2-3, 8.

The Act was administered by the National Air Pollution Control Administration of the Department of Health, Education and Welfare, which formalized the concept of nondeterioration in its Guidelines for the Development of Air Quality Standards and Implementation Plans, Part I, § 1.51 at 7 (1969):

"[A]n explicit purpose of the Act is "to protect and enhance the quality of the Nation's air resources" (emphasis added). Air quality standards which, even if fully implemented, would result in significant deterioration of air quality in any substantial portion of an air quality control region clearly would conflict with this expressed purpose of the law.

See generally, Non-Degradation—Clean Air Act and Amendments Held to Mandate a Policy Prohibiting Significant Deterioration of Air Quality in Areas of Relatively Clean Air, 2 FORDHAM URBAN L. J. 136 (1973) (hereinafter *Clean Air Act Held to Prohibit Significant Deterioration*); *The Clean Air Act and the Concept of Non-Degradation: Sierra Club v. Ruckelshaus*, 2 ECOLOGY L. Q. 801 (1971) (hereinafter *The Concept of Non-Degradation*).

and preserve national air quality standards. As I have indicated, they would have the option of designing their implementation plans to achieve or preserve higher than national quality levels, if they wished to do so.

As you know, one of the express purposes of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources" * * *. Accordingly, it has been and will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with this provision. We shall continue to expect States to maintain air of good quality where it now exists.

Air Pollution—1970, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, Part I, 132-133 (1970). Undersecretary Veneman went on to state that "[i]t will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with the provisions of the Act. We do not intend to condone 'backsliding.' If an area has air quality which is better than the national standards, they would be required to stay there and not pollute the air ever further, even though they may be below national standards." *Id.* at 143.

The Senate committee report gave express recognition to the concept of nondeterioration, directing that

[i]n areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality. Once such national goals are established, deterioration of air quality should not be

permitted except under circumstances where there is no available alternative.

S. Rep. No. 91-1196, 91st Cong., 2d Sess. 11 (1970) (emphasis added). Quite to the contrary, however, there was no particular significance ascribed to the "shall approve" language of the section which became Section 110(a)(2). *Id.* at 11-15.

The explanation of this omission in the legislative history appears to be that the 1970 amendments were aimed at states that refused to take action to improve their air quality. The background of the 1970 amendments was described in *Tra v. NRDC*, *supra*, 421 U.S. at 64:

The response of the States to these manifestations of increasing congressional concern with air pollution was disappointing. Even by 1970, state planning and implementation under the Air Quality Act of 1967 had made little progress. Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970 * * *.

The "stick" was the group of express requirements as to the content of state implementation plans.³¹ The "shall approve" language was addressed to the administrative problems that would be caused by a requirement that all states submit complying implementation plans within a

³¹ "The Committee recognized that because the proposed bill would require a great deal in a short period of time and because the brevity of the provision in existing law has led to uneven and inadequate interpretation, the character of an implementation plan must be specified and the alternative methods of achievement listed. The Committee bill would require that a rigorous time sequence be met in the development of the implementation plan and would provide for the substitution of Secretarial authority if the State plan, or a portion thereof, is inadequate to attain the quality of ambient air established by the nationally promulgated ambient air quality standard." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 12 (1970).

limited time; the provisions of Section 110(a) are, more than anything else, a summary of the mandatory requirements for all state implementation plans.³² We have, however, found no indication, nor have we been cited to any indication in the legislative history, that Section 110 was intended in any way to vitiate the nondeterioration mandate contained in the Senate report.³³

This court has recently cautioned that a failure by Congress expressly to reject the administrative construction of an act need not, without more, indicate congressional acquiescence in the agency interpretation.³⁴ In *Chisholm v. FCC*, — U.S. App.D.C. —, — F.2d — (No. 75-1951, decided April 12, 1976), the court refused to ascribe significance to congressional inaction when it appeared that Congress was "aware" of the administrative interpreta-

³² See note 31 *supra*.

³³ See *The Concept of Non-Degradation*, *supra* note 30, at 819:

The legislative history does support the contention that the principle of non-degradation is implicit in the Clean Air Act. It resolves the vagueness of both the purpose clause and section 110. Although the history of the 1967 Act conveys an ambiguous picture of the legislative intent, the history of both the 1970 Amendments and the later Implementation Hearings clearly indicates that Congress confronted the complexities of air pollution control and undertook a program designed to prevent the deterioration of clean air.

³⁴ *Chisholm v. FCC*, — U.S.App.D.C. —, —, — F.2d —, —, slip op. at 26 (No. 75-1951, decided April 12, 1976):

We begin by noting that attributing legal significance to Congressional inaction is a dangerous business * * *. The Supreme Court has said that Congressional failure to repudiate particular decisions "frequently betokens unawareness, preoccupation, or paralysis" rather than conscious choice, *Zuber v. Allen*, 396 U.S. 168, 185-86 n. 21 (1969), and "affords the most dubious foundation for drawing positive inferences," *United States v. Price*, 361 U.S. 304, 310-11 (1960) (Harlan, J.).

tion only "in a technical sense." — U.S. App.D.C. at —, — F.2d at —, slip op. at 27. We are not presented with that situation. Not only was the Agency's interpretation of the Air Quality Act of 1967 as mandating prevention of significant deterioration clearly before the Congress in 1970, but the committee reports contain express language that the principle of nondeterioration was preserved by the Clean Air Act Amendments of 1970.

This sort of express congressional recognition of the implementing agency's statutory construction can be extremely significant in interpreting legislative intent. In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), for instance, the Court found approval of a long-standing administrative interpretation in Congress' studied inaction:

In addition to the importance of legislative history, a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.

416 U.S. at 274-275. The Court reached similar results in *Zemel v. Rusk*, 381 U.S. 1, 11 (1965) (administration of Passport Act of 1926); *C.I.R. v. Estate of Noel*, 380 U.S. 678, 682 (1965); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 365-366 (1951); *Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110, 114-225 (1939); and *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 313 (1933), among others.

In the instant case there is every indication that Congress intended in 1970 to continue a policy of prevention of significant deterioration of air quality. In addition, we find nothing in the legislative history to indicate that Congress had any desire or intention that the 1970 amend-

ments hinder the fight against air pollution by voiding the principle of nondeterioration.

It is significant in this regard that recent congressional statements have supported the historic existence of a requirement of nondeterioration. The report of the House Committee on Interstate and Foreign Commerce on the proposed Clean Air Act Amendments of 1976 (H.R. Rep. No. 94-1175, May 15, 1976) endorses a new statutory definition of nondeterioration, commenting that "[t]he Committee has developed this section to provide clearer definition of the nearly decade-old policy (reflected in section 101 (b) of the Act) that significant deterioration of clean air must be avoided, and to provide more specific congressional guidance as to how this policy is to be implemented." *Id.* at 83. A contemporaneous report of the Senate Committee on Public Works on similar proposed amendments has both restated the language quoted above from the 1970 Senate report³⁵ and reaffirmed the continuing policy of non-deterioration:

A nondegradation policy was articulated first in Federal water pollution law. That was in 1965. The concept was incorporated into the 1967 Air Quality Act, which stated that a basic purpose of the Act was to "protect and enhance the quality of the Nation's air resources." That language was not altered by the 1970 Clean Air Amendments. This bill clarifies and details that policy.

Clean Air Amendments of 1976, S. Rep. No. 94-717 at 20 (March 29, 1976). It would fly in the face of overwhelming evidence of legislative intent to hold that the Clean Air Act does not contain a requirement of prevention of significant deterioration.

³⁵ See pp. [19a-20a] *supra*.

Our belief that *Sierra Club v. Ruckelshaus* was decided properly is bolstered by its acceptance in a number of other circuits.³⁶ Petitioners suggest, however, that the later decision in *Train v. NRDC*, 421 U.S. 60 (1975), and enactment of the Energy Supply and Environmental Coordination Act of 1974, 88 STAT. 246, are necessarily inconsistent with the concept of nondeterioration of air quality. We reject both contentions.

Train v. NRDC involved construction of the "shall approve" language of Section 110(a)(3)(A),³⁷ which requires that the Administrator approve revisions of state plans which, after revision, meet the criteria of Section 110(a)(2). The Court held that state action which grants a variance to an individual pollution source must be approved by the Administrator if the approval will not expand the time for compliance with national primary ambient air quality standards³⁸ or otherwise violate the re-

³⁶ See *NRDC v. EPA*, 489 F.2d 390, 408 (5th Cir. 1974), *rev'd on other grounds, sub nom. Train v. NRDC*, 421 U.S. 60 (1975); *Big Rivers Electric Corp. v. EPA*, 8 ERC 1092 (6th Cir. 1975); *Union Electric Co. v. EPA*, 515 F.2d 206, 220 (8th Cir. 1975), *aff'd on other grounds*, — U.S. —, 44 U.S. L. WEEK 5060 (June 25, 1976); *NRDC v. EPA*, 507 F.2d 905, 913 (9th Cir. 1974). Cf. *Highland Park v. Train*, 519 F.2d 681, 685 (7th Cir. 1975).

³⁷ "The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph 2 [§ 110(a)(2)] and has been adopted by the State after reasonable notice and public hearings." Section 110(a)(3)(A), 42 U.S.C. § 1857c-5(a)(3)(A) (Supp. IV 1974).

³⁸ Section 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A) (1970): The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable

quirements of Section 110(a)(2). In the following passage, strongly pressed upon us by petitioners, the Court emphasized the mandatory language of Section 110(a)(2):

The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards.

421 U.S. at 79 (emphasis in original).³⁹ It is argued that this decision removes from the Administrator the discretion to disapprove a plan which complies with Section 110(a)(2), and therefore requires that *Sierra Club v. Ruckelshaus* be overturned. This argument, however, is

but * * * in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained[.]

³⁹ The language was repeated in *Hancock v. Train*, — U.S. —, —, 44 U.S. L. WEEK 4767, 4768 (June 7, 1976) (dictum), which concerned the obligation of federal facilities to comply with the requirements of state implementation plans.

subject to the same analysis by which we reject the argument based on Section 110(a)(2) alone. Unlike the instant case, *Train* was concerned with air pollution below the national standards, and the question was whether individual variances would prevent the states from achieving the standards within the prescribed time limits. The Supreme Court in *Train* did not consider the issue of nondeterioration, even though the decision below was based in part on *Sierra Club v. Ruckelshaus*.⁴⁰ Rather than assume, as the industrial petitioners would have us, that *Train* silently overturned the earlier divided affirmance in *Sierra Club*, we find it more reasonable to conclude that the Court did not address the issue, and we reject the argument based on *Train*.

In another recent decision, *Union Electric Co. v. EPA*, — U.S. —, 44 U.S. L. WEEK 5060 (June 25, 1976), the Supreme Court found challenges to state implementation plans based on economic infeasibility to be barred by the mandatory nature of Section 110(a)(2). The Court found in the legislative history of the 1970 amendments a congressional determination that clean air objectives should take precedence over claims of economic or technological infeasibility:

As we have previously recognized, the 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise unchecked problem of air pollution. The Amendments place the primary responsibility for formulating pollution control strategies on the States, but nonetheless subject * * * the States to strict minimum compliance requirements. These requirements are of a "technology-forcing character," *Train v. NRDC*, 421 U.S., at 91, and are expressly designed to force regulated

⁴⁰ *NRDC v. EPA*, *supra* note 36, 489 F.2d at 408. The *Train* decision was limited expressly to the question of approval of variances. 421 U.S. at 69-70.

sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.

This approach is apparent on the face of § 110(a)(2). The provision sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator "shall approve" the proposed state plan. The mandatory "shall" makes it quite clear that the Administrator is not to be concerned with factors other than those specified, *Train v. NRDC*, 421 U.S., at 71 n. 11, 79, and none of the eight factors appears to permit consideration of technological infeasibility.

— U.S. at —, 44 U.S. L. WEEK at 5063. Although the Court stressed the "shall approve" language of Section 110(a)(2), its construction was founded on a concern that the congressional mandate of prompt implementation of pollution control plans not be disserved. The Court was not presented with the distinct question whether the "shall approve" language of Section 110(a)(2) must be read to subvert the concomitant congressional directive that significant deterioration of air cleaner than the national standards be prevented.⁴¹ Thus, despite the emphasis placed on (a)(2) by the opinions in *Train v. NRDC* and *Union Electric*, we do not believe the result in the instant case is controlled by either opinion.

Petitioners also rely on the Energy Supply and Environmental Coordination Act of 1974 (ESECA), which

⁴¹ As was the case in *Train v. NRDC*, the lower court in *Union Electric* expressly had approved the concept of prevention of significant deterioration. *Union Electric Co. v. EPA*, *supra* note 36, 515 F.2d at 220 n.39. The Supreme Court affirmed the Court of Appeals without mentioning that issue.

was enacted to encourage stationary fuel-burning sources to convert from oil to coal, to minimize the nation's dependence on imported oil. Among other things, it (1) authorized the Federal Energy Administration to require power plants and other major fuel-burning sources to burn coal, (2) amended the Clean Air Act to provide a limited exemption from stationary source requirements to those converting facilities,⁴² and (3) required the Administrator of EPA to review the implementation plan of each state and notify any state which could revise its plan as to stationary fuel-burning sources without violating the national ambient air quality standards.⁴³ The ESECA is accommodated in the "significant deterioration" regulations by 40 C.F.R. § 52.21(d)(1), which exempts from preconstruction review modifications "to utilize an alternative fuel, or higher sulfur content fuel."

Although conversion to "dirtier" fuels such as coal certainly will impair both improvement and maintenance of air quality, there is no reason to believe that passage of ESECA was intended to eliminate the requirement of non-deterioration.⁴⁴ The amendment was a necessary response to the nationwide shortage of oil and natural gas, and no

⁴² Section 119, 42 U.S.C. § 1857e-10 (Supp. IV 1974).

⁴³ Section 110(a)(3)(B), 42 U.S.C. § 1857e-5(a)(3)(B) (Supp. IV 1974).

⁴⁴ The "purpose" section of ESECA, 15 U.S.C. § 791 (Supp. IV 1974), is as follows:

The purposes of this chapter are (1) to provide for a means to assist in meeting the essential needs of the United States for fuels, *in a manner which is consistent, to the fullest extent practicable, with existing national commitments to protect and improve the environment*, and (2) to provide requirements for reports respecting energy resources.

(Emphasis added.)

reason has been presented for ascribing to it a greater significance.⁴⁵

We therefore find no substantial reason to question under ESECA or *Train*, the continuing validity of *Sierra Club v. Ruckelshaus*, and we proceed to the substance of the regulations under review using that decision as our guide.

B. Are the regulations invalid on the ground that only two of the six primary air pollutants are considered?

The regulations provide for control only of particulate matter and sulfur dioxide emissions,⁴⁶ whereas the Administrator also has identified carbon monoxide, nitrogen oxides, hydrocarbons, and photochemical oxidants as air pollutants which have an adverse effect on public health or welfare.⁴⁷ It is contended that the regulations violate the District Court's order in *Sierra Club v. Ruckelshaus* by failing to prevent significant deterioration of air quality with respect to those four pollutants.⁴⁸

EPA has responded that the interrelationships among those four pollutants, and the relationships between in-

⁴⁵ We also reject the argument that it is "unfair" to count the increased emissions from a source that is converted to coal against the allowable pollution increment for the area, since that modification is exempted from preconstruction review. We see no reason why a state in which major utilities have been forced to convert to coal may not choose to impose commensurately stricter standards on the remainder of the area.

⁴⁶ See note 18 *supra*.

⁴⁷ 40 C.F.R. §§ 50.8-50.11 (1975).

⁴⁸ The order required that the Administrator "prepare and publish proposed regulations, pursuant to 42 U.S.C. § 1857e-5(e), as to any state plan which he finds, on the basis of his review, either permits the significant deterioration of existing air quality in any portion of any state or fails to take the measures necessary to prevent such significant deterioration." *Sierra Club v. Ruckelshaus*, Civil Action No. 1031-72 (D. D.C. May 30, 1972).

cremental increases in those pollutants and deterioration of air quality, are poorly understood and cannot be determined with any reasonable degree of accuracy:

These [four pollutants] are commonly referred to as "automotive pollutants," because the automobile is the major source of each of them * * *. The first three (HC, NO₂, and O₃) are also known as "photochemical" or "reactive" pollutants, because under the influence of sunlight, they enter into a complex chemical reaction in the atmosphere. * * * The rate at which the reaction occurs depends on a number of variables, including temperature, humidity, solar intensity, and the concentrations of the input pollutants. * * *

The chief reason for excluding photochemical pollutants from these regulations is that the relationship between the emission of HC and oxides of nitrogen, on the one hand, and the resulting ambient levels of the harmful pollutants, O₃ and NO₂, on the other, is very poorly understood. The only method for relating emissions to air quality for these pollutants is the "area-wide proportional model." This model assumes, as its name suggests, that ambient pollutant levels are proportional to total emissions. The model is useful only in areas where ambient pollutant levels are substantial and well-monitored, as in urban areas with smog problems. * * * But the proportional model cannot be used to regulate air quality deterioration in clean-air areas. This is because the assumptions underlying the model do not hold in clean-air areas, and also because it is not possible to make accurate measurements of ambient levels of photochemical pollutants that are substantially below the levels of the national standards.

Br. for respondent at 32-33 (footnote omitted), *elucidating*, 39 Fed. Reg. 31006 (August 27, 1974); 39 Fed. Reg.

42511 (December 5, 1974); *Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality*, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards (January 1975), at 21-27 (JA 117-123). EPA concluded that existing technology "is inappropriate for analyzing the incremental impact of individual new sources" with respect to the four "automotive pollutants," and that "[a]t this time, the only practical approach for dealing with these pollutants appears to be to minimize emissions as much as possible." 39 Fed. Reg. 42511 (December 5, 1974). EPA further has contended that ongoing programs toward reduction of automotive emissions "are adequate to prevent any significant deterioration due to sources of carbon monoxide, hydrocarbons or nitrogen oxides."⁴⁹

Petitioners have emphasized that the four omitted pollutants can have extremely adverse effects on public health and welfare, and have noted that they are emitted by stationary sources as well as by moving vehicles. Petitioners have not, however, directly clashed with EPA's contention that it does not have technology or modeling techniques rationally to regulate emissions on a case-by-case basis. This is the type of policy decision in which the Agency's developed expertise is heavily implicated, and with which the court will not tamper so long as the decision was rational and based on consideration of the relevant factors. *Ethyl Corp. v. EPA, supra*, — U.S. App.D.C. at — - —, — F.2d at — - —, slip op. at 66-74. Given the absence of any direct denials of EPA's assertions on this point, the Agency is entitled to claim the presumption of validity which attends its actions. *Id.*, slip op. at 68. We therefore hold that EPA did not act unlawfully in excluding from its regulations the four "automotive pollutants."

⁴⁹ 39 Fed. Reg. 31006 (Aug. 27, 1974).

- C. Are Class II and Class III invalid as permitting significant deterioration of air quality?
- D. Is it unlawful to make determinations as to permissible air quality deterioration on the basis of considerations other than air quality?

It is argued by Sierra Club that Classes II and III, by permitting increases in sulfur dioxide and particulate matter pollution to levels which in some areas may be many times present concentrations, allow significant deterioration of air quality. The "significance" is primarily a matter of the numbers involved; although evidence has been presented that levels of pollution below the national secondary standards may have adverse health effects,⁵⁰ it is for the Administrator rather than the courts to determine that the national secondary standards no longer can be said to protect the public from "any known or anticipated adverse effects" of a pollutant. The question of significance thus leads by implication to a second line of argument—that it is unlawful to consider deterioration of air quality "insignificant" simply because it accompanies normal, controlled economic development.

EPA recognized, in developing the concept of "significant deterioration" pursuant to Judge Pratt's order, that "[p]ending the development of adequate scientific data on the kind and extent of adverse effects of air pollutant levels below the secondary standards, significant deterioration must necessarily be defined without a direct quantitative relationship to specific adverse effects on public health and welfare." 39 Fed. Reg. 18987 (July 16, 1973). It therefore determined that each state must determine what level of

⁵⁰ Br. for petitioners Sierra Club *et al.*, No. 74-2063, at 18-20. See also *Clean Air Act Amendments of 1976*, Report of the Senate Committee on Public Works, S. Rep. No. 94-717 at 19-27 (March 29, 1976); *Clean Air Act Amendments of 1976*, Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 94-1175 at 83-116 (May 15, 1976).

incremental pollution, taking into account the air quality and social and economic needs and objectives of the area, would be "significant deterioration" of its air quality.⁵¹

In that context, it was a rational policy decision that the significance of deterioration of air quality should be determined by a qualitative balancing of clean air considerations against the competing demands of economic growth, population expansion, and development of alternative sources of energy. The approach provides a workable definition of significant deterioration which neither stifles necessary economic development nor permits unregulated deterioration to the national standards.⁵² We therefore find that EPA acted within the discretion it is granted as to matters of policy⁵³ in choosing this design to prevent significant deterioration of air quality.

We may state our belief, as a general overview at this point, that for the most part it somewhat misses the mark to raise objections to the specific emission limits of the regulations under review. EPA has emphasized that the individual states are free to conceive and adopt their own methods of preventing significant deterioration. A state may use EPA's system to classify itself as industrial-metropolitan (Class III), as anticipating normal economic growth (II), or as desirous of protecting its clean air (I). But it also may develop its own scheme,

⁵¹ See pp. [10a-11a] *supra*.

⁵² EPA acknowledges that all states theoretically could reclassify to Class III, thereby permitting unregulated deterioration to the national standards. It asks that the states not "arbitrarily and capriciously" disregard its outlined considerations before redesignating areas. 40 C.F.R. § 52.21(e)(3)(vi)(a).

⁵³ "However formal the type of agency proceeding, an agency's policy choices are reviewed under the arbitrary and capricious standard, which asks merely whether the policy choice is rationally connected to its factual basis." *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard*, 84 YALE L. J. 1750, 1751 (1975).

based on its own needs, so long as the regulatory structure prevents significant deterioration of air cleaner than the national standards. Given the broad power vested in the states to alter or amend these regulations, we find little merit in objections to the specifics of the classification scheme itself.

E. Has the effective date of the regulations been postponed unlawfully beyond the date contemplated by the Clean Air Act?

The Clean Air Act of 1970 imposed a series of time limits for the various steps leading up to approval of state implementation plans. Under that timetable regulations should have become effective by the middle of 1972.⁵⁴

The regulations employ two later effective dates. First, emissions increments are measured from a January 1, 1975 baseline, and all sources for which "approval" is given after that date will have their emissions counted against the allowable increment for the region. 40 C.F.R. § 52.21 (d)(2)(i) (1975). Second, preconstruction review is provided only for sources which have "not commenced construction or modification prior to June 1, 1975." 40 C.F.R. § 52.21(d)(1) (1975). "Commenced" means that an owner or operator has undertaken a continuous program of con-

⁵⁴ The Clean Air Act Amendments of 1970 were added on Dec. 31, 1970, 84 STAT. 1677. The Administrator was given 90 days in which to propose and promulgate national primary and secondary ambient air quality standards. Section 109(a)(1)(B), 42 U.S.C. § 1857e-4(a)(1)(B). The states then were given nine months to submit proposed implementation plans to the Administrator, § 110(a)(1), 42 U.S.C. § 1857e-5(a)(1), and the Administrator had four months to approve or disapprove the plans. Section 110(a)(2), 42 U.S.C. § 1857e-5(a)(2). The Administrator was to "promptly prepare and publish" implementation plans for states which failed to submit a complying plan or which failed to revise a plan after 60 days notice. Section 110(c), 42 U.S.C. § 1857e-5(c). The target date for effectiveness of state implementation plans was therefore mid-1972.

struction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification." 40 C.F.R. § 52.21(b)(7) (1975). Compare 40 C.F.R. § 52.01(b) (1975). All later-commenced source construction must be reviewed for compliance with new source performance standards and for a determination that construction will not cause the pollution increments of any area to be violated. 40 C.F.R. § 52.21(d)(2) (1975), as amended, 40 Fed. Reg. 42011 (September 10, 1975).

We are asked to hold that sources for which construction was commenced after mid-1972 must be counted against the allowable pollution increments for the various regions. EPA answers that inclusion of the earlier construction would limit practical use of the regulations to regulate future development. We accept the latter position. Whatever the effect of past construction has been upon present pollution, each state must determine what will be appropriate for future air quality and economic development. So long as any state may choose to limit future development to compensate for excessive past pollution, the choice of starting dates for the applicability of the regulations appears to be irrelevant.⁵⁵ For the same reason we do not believe EPA acted unreasonably in failing to count increases in pollution since 1972 against the allowable increments. It was a rational policy decision to limit the instant regulations to prospective concerns only.

F. Is it arbitrary and capricious to review proposed construction of stationary sources on the basis of

⁵⁵ Similarly, we find no ground for objection to the manner in which EPA has defined commencement of construction. 40 C.F.R. § 52.21(b)(7) (1975). Even if a source on which construction has "commenced" is not subject to preconstruction review, its emissions may be considered in choosing the appropriate pollution increment to be applied to the area.

compliance with the New Source Performance Standards, rather than on the basis of Best Available Control Technology on a case-by-case basis?

- G. Was the Administrator required to provide for preconstruction review of all sources, rather than for "significant" sources only?

40 C.F.R. § 52.21 (d) (ii) (1975) requires that new sources which are subject to preconstruction review meet the level of emissions that would be achieved by application of the Best Available Control Technology (BACT); Section 52.01 (f) defines BACT as equivalent to the New Source Performance Standards (NSPS) promulgated under Section 111 of the Clean Air Act, 42 U.S.C. § 1857c-6 (1970), *amended* (Supp. IV 1974), when those standards are available. If no NSPS has been established for a category of sources, preconstruction review of emission reduction systems is done on a case-by-case basis. 40 C.F.R. §§ 52.21 (d) (2) (ii), 52.01 (f) (1975). The Sierra Club posits that the NSPS guidelines, defined by Section 111 as "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated," are a "lowest common denominator"-based group and are inconsistent with the policy of nondeterioration.

We accept EPA's response that case-by-case review of all new sources would not only be unworkable, but would undermine Section 111 by limiting its application of NSPS to those areas which have not yet achieved the national secondary standards. It appears, in addition, that application of NSPS rather than BACT will not of necessity lead to more total pollution; a given area still is limited to the specified increment for its classification, and the use of a less effective emission reduction system by one new statutory source will simply use up more of the allowable

increment and limit opportunities for other proposed new sources. This trade-off, between types of control systems and opportunities for new source construction, is best left to the states, which by delegation will administer the preconstruction review. As the Supreme Court held in *Train v. NRDC, supra*, "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." 421 U.S. at 79. We therefore hold that the use of NSPS is rational and in accord with the Clean Air Act.

An additional challenge to the procedures for preconstruction review is based on the allegedly unlawful limitation of review to 19 specified categories of sources.⁵⁶ We

⁵⁶ The 19 listed categories are:

- (i) Fossil-Fuel Steam Electric Plants of more than 1000 million B.T.U. per hour heat input.
- (ii) Coal Cleaning Plants.
- (iii) Kraft Pulp Mills.
- (iv) Portland Cement Plants.
- (v) Primary Zinc Smelters.
- (vi) Iron and Steel Mills.
- (vii) Primary Aluminum Ore Reduction Plants.
- (viii) Primary Copper Smelters.
- (ix) Municipal Incinerators capable of charging more than 250 tons of refuse per 24 hour day.
- (x) Sulfuric Acid Plants.
- (xi) Petroleum Refineries.
- (xii) Lime Plants.
- (xiii) Phosphate Rock Processing Plants.
- (xiv) By-Product Coke Oven Batteries.
- (xv) Sulfur Recovery Plants.
- (xvi) Carbon Black Plants (furnace process).
- (xvii) Primary Lead Smelters.
- (xviii) Fuel Conversion Plants.
- (xix) Ferroalloy production facilities commencing construction after October 5, 1975.

40 C.F.R. § 52.21 (d) (1) (i)-(xix) (1975), *as amended*, 40 Fed. Reg. 42011 (Sept. 10, 1975).

find this argument subject to the analysis presented above with respect to use of NSPS rather than BACT. Review of every new source of pollution clearly would be impossible since every gas- or oil-heated house is a source of some pollution. The decision to review only those sources which emit more than 25 pounds per hour of sulfur dioxide or particulate matter⁵⁷ does not mean there will of necessity be more total pollution; it means only that a large number of minor sources could use up the area's allowable increment and thereby preclude construction of new major sources of pollution. As EPA stated in a document explaining its regulations:

The 18 categories which are covered by the regulation, except for fuel conversion plants, are the largest present emitters of SO₂ and TSP on a nationwide basis. Fuel conversion plants (coal gasification and liquefaction, oil shale processing, etc.) were included due to their significant growth potential, particularly in presently clean areas * * *. The air quality impact of sources not included in the 18 categories is taken into account since the total air quality deterioration above the baseline is taken into account when an application to construct a new source of one of the 18 categories is reviewed.

⁵⁷ The standard of 25 pounds/hour of emissions for addition of new categories to the list of those subject to preconstruction review was proposed on June 9, 1975 (40 Fed. Reg. 24534) and adopted Sept. 10, 1975 (40 Fed. Reg. 42011):

[T]he criteria the Administrator intends to use in adding further sources in the future * * * are:

- (1) a new source performance standard for sulfur dioxide (SO₂) or particulate matter has been established for the source or any facility of the source under Part 60 of this chapter, and (2) the established new source performance standard will allow any anticipated future plant affected by the standard to emit SO₂ or particulate matter in excess of 25 pounds per hour from the affected facility or facilities when operating at maximum design capacity.

The later notice also added the 19th category, Ferroalloy production facilities.

Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality, U.S. Environmental Protection Agency, Office of Air Quality Planning & Standards (January 1975), at 27-28. Further, it is within the power of the various states to enact more stringent controls, and expanded preconstruction review procedures, should limited review lead to problems in regulating incremental pollution. We therefore hold that the regulations are not invalid insofar as provision is made for preconstruction review of only the specified categories of stationary sources.

H. Are the regulations arbitrary and capricious on the ground that the allowable increments are unrelated to anticipated adverse effects on public health and welfare?

The regulations under review establish a classification scheme which is not based on demonstrated adverse air quality effects, but rather on a balancing of concerns with air quality, economic and social needs and objectives, and development of energy sources. The industrial petitioners contend that EPA is not authorized to promulgate regulations which are not related to adverse air quality effects, and that Classes I and II therefore are invalid.

The need to prevent significant deterioration of air cleaner than the national standards, and the statutory authorization therefor, was settled by the *Sierra Club v. Ruckelshaus* litigation. It clearly is a rational legislative purpose to protect and enhance the quality of the nation's air, even in the absence of quantified evidence of adverse effects.⁵⁸

⁵⁸ EPA emphasized in promulgating regulations that levels of pollution below the national standards still may have some adverse effects:

Limitations on air quality that result in cleaner air than the national ambient air quality standards cannot * * * be

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The District Court order in *Sierra Club v. Ruckelshaus* mandated that EPA enforce this legislative purpose by preventing significant deterioration of air quality, but left definition of "significant" to the Agency. EPA's solution was a definition created by its own implementation; each state's evaluation of the relative importance of the competing interests which surround continued maintenance of air quality will determine what level of deterioration would be significant for that state. The three classifications thus are not intended to represent a scientific conclusion as to what constitutes significant deterioration; rather, they are suggested frameworks for use by the states after independent evaluation. Because the regulations do not purport to be mandatory requirements based on scientific research, they properly cannot be judged by asking whether

based on any quantitative measure of harm to either public health or welfare. This is not, however, to say that there are no possible unquantified adverse effects on public health or welfare below the levels of the national standards. Examples of such unquantified effects involve the transformation of sulfur dioxide into suspended sulfates and sulfuric acid aerosols, resulting in possible effects on health, visibility, climatic changes, acidity of rain, and deterioration of materials.

Since there is no way to relate "significance" of deterioration of air quality to any adverse effects resulting from air quality levels cleaner than the national standards, EPA concluded that the determination of what is "significant" deterioration must take into account factors other than air quality alone. For example, relatively minor deterioration of the aesthetic quality of the air may be very significant in a recreational area in which great pride (and economic development) is derived from the "clean air."

Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality, U.S. Environmental Protection Agency, Office of Air Quality Planning & Standards (January 1975), at 6. See also *Clean Air Act Amendments of 1976*, Report of the Senate Committee on Public Works, S. Rep. No. 94-717 at 19-27 (March 29, 1976); *Clean Air Act Amendments of 1976*, Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 94-1175 at 93-116 (May 15, 1976).

the increments are related to demonstrated health effects. As we have noted above, any state could adopt even more stringent regulations by proposing its own revision to its implementation plan.⁵⁹

We therefore find insubstantial the objection that the varying allowable increments presented in the instant regulations are unrelated to demonstrated adverse health effects. The regulations flow from a valid legislative goal, and we believe EPA has acted reasonably in permitting each state, in its informed discretion, to develop a workable definition of "significant deterioration."

I. Are the regulations unworkable because present modeling techniques are inadequate to predict precisely how a new source will affect the ambient air?

Some petitioners⁶⁰ have objected that present computer modeling technology is inadequate to predict with precision what effect a proposed new source will have on the ambient air, and therefore on the allowable increment for a given region. EPA does not dispute the point as to the accuracy of existing techniques, but does argue that present diffusion modeling techniques, "while not corresponding to actual conditions in the ambient air, do provide a consistent and reproducible guide which can be used in comparing the relative impact of a source." 39 Fed. Reg. 31003 (August 27, 1974). So long as the method of measurement is consistent, it may be used as a reliable benchmark of the relative impact of different sources; EPA argues that it therefore is unnecessary to be able to guarantee with precision what effect a source will have.

We have no basis on which to question EPA's judgment as to its predictive techniques. Any consistent method of

⁵⁹ See pp. [14a-15a] *supra*.

⁶⁰ See, e.g., *br. of American Petroleum Institute et al.* in No. 75-1665 at 38.

prediction can be adjusted in light of actual experience, and a state therefore may adjust its guidelines for future development on the basis of changes in the measured pollution levels over time. We cannot hold at this time, therefore, that lack of precision alone is a substantial objection to the methods which may be used to estimate the impact of a proposed source on actual levels of pollution.

J. Did EPA violate the Clean Air Act

- (1) by not permitting submission of revised plans before promulgating regulations, or
- (2) by not holding hearings in each state before promulgating the regulations?

The Administrator is required to prepare and publish his own implementation plan, or portion thereof, for a state if (a) the state fails to submit a plan as to any national standard, (b) the plan is not in accordance with the requirements of Section 110 of the Act, or (c) the state fails, within 60 days, to revise its plan pursuant to Section 110(a)(2)(H), which requires that implementation plans provide for revisions (i) to take account of changes in technology or (ii) if the Administrator determines that the plan is inadequate to achieve the primary or secondary standards. Section 110(c)(1), 42 U.S.C. § 1857c-5(c)(1) (Supp. IV 1974). Subsection (c)(1) also contains a hearing requirement; if a state did not hold a public hearing with respect to the plan or revision being promulgated, the Administrator must provide a hearing within the state. The Administrator is to promulgate his regulations within six months, unless within that time the state has adopted and submitted an implementation plan which is in accord with the requirements of Section 110. *Id.*

It is contended that the instant regulations, which amended the implementation plans of all states,⁶¹ consti-

⁶¹ See note 9 *supra*.

tuted a "revision" under Section 110(a)(2)(H). Under Section 110(c)(1)(C) the Administrator may promulgate new regulations only if a state fails, after 60 days, to submit the required (a)(2)(H) revision. Further, if the regulations are considered "revisions," it is claimed, the Administrator was required by Section 110(c)(1) to hold a hearing in each state before promulgating the regulations.

The original order of the District Court required that the "Administrator * * * prepare and publish proposed regulations, pursuant to 42 U.S.C. § 1857c-5(c), as to any state plan which he finds, on the basis of his review, either permits the significant deterioration of existing air quality in any portion of any state or fails to take the measures necessary to prevent such significant deterioration. Such regulations shall be promulgated within six months of this order." *Sierra Club v. Ruckelshaus*, Civil Action No. 1031-72 (D. D.C. May 30, 1972). That order—which was affirmed by this court and the Supreme Court—clearly did not contemplate that a hearing be held in each state prior to promulgation of regulations, nor did it require that the states be given a prior opportunity to revise their plans. We reaffirm the order in both respects.

All states had held public hearings on their proposed implementation plans before the District Court order was entered.⁶² After disapproving all state plans insofar as they failed to prevent significant deterioration,⁶³ the Administrator held five regional hearings in Washington, Atlanta, Dallas, Denver, and San Francisco on proposed regulations,⁶⁴ and solicited written comments.⁶⁵ We believe that

⁶² In its initial approval and disapproval of state plans, published May 31, 1972 (37 Fed. Reg. 10842), EPA noted that all states had held hearings and had submitted implementation plans.

⁶³ 37 Fed. Reg. 23836 (Nov. 9, 1972).

⁶⁴ See 39 Fed. Reg. 31000 (Aug. 27, 1974).

⁶⁵ *Id.*

procedure was sufficient in the circumstances presented. Unfortunately, the requirement of prevention of significant deterioration does not fit neatly into the statutory scheme, as it is not expressly included in Section 110 of the Act. The Administrator's disapproval of all plans pursuant to the District Court order, and the subsequent promulgation of regulations, were required by Section 101 of the Act and by the legislative history, but were not within the defined processes of Section 110(c). Implementation of the District Court order required an exercise of discretion by the Administrator, and we find that he acted well within that discretion by concluding that only regional hearings were necessary to supplement the hearings which had already been held in all states.

In making this decision we wish to emphasize, first, that petitioners have not alleged with any specificity how they were harmed by the lack of individual state hearings. We are presented only with a generalized statutory claim,⁶⁶ which apparently never was raised before the Agency. Second, it should be remembered that the states arguably have been denied no rights by promulgation of the non-deterioration regulations. They remain free, after public hearing, to develop their own regulatory scheme to supplant that promulgated by EPA, so long as the substitute

⁶⁶ Cf. *American Airlines, Inc. v. CAB*, 123 U.S.App.D.C. 310, 318-319, 359 F.2d 624, 632-633, cert. denied, 385 U.S. 843 (1966):

[T]here is no basis on the present record for concluding that additional procedures were requisite for fair hearing. We might view the case differently if we were not confronted solely with a broad conceptual demand for an adjudicatory-type proceeding, which is at least consistent with, though we do not say it is attributable to, a desire for protracted delay. Nowhere in the record is there any specific proffer by petitioners as to the subjects they believed required oral hearings, what kind of facts they proposed to adduce, and by what witnesses, etc. * * *

See also *United States v. L. A. Trucker Lines, Inc.*, 344 U.S. 33 (1952).

prevents significant deterioration of air quality.⁶⁷ We cannot conclude, then, that the regulations are defective on procedural grounds.

K. By providing for reclassification of federal and Indian lands independent of state action, do the regulations abrogate authority granted to the states by the Clean Air Act?

Federal land managers and Indian governing bodies are authorized to propose redesignation of their lands, after consultation with officials of other affected areas and compliance with procedural and hearing requirements. 40 C.F.R. § 52.21(c)(3) (1975).⁶⁸ The industrial petitioners and the petitioning state governments object that this authority violates the delegation to the states of authority over air quality within their boundaries in Section 101(a)(3), 42 U.S.C. § 1857(a)(3),⁶⁹ and Section 107(a), 42 U.S.C. § 1857c-2(a),⁷⁰ that it contradicts the submission of federal facilities to state regulation in Section 118, 42 U.S.C.

⁶⁷ See pp. [14a-15a] *supra*.

⁶⁸ See pp. [11a-12a] *supra*.

⁶⁹ 42 U.S.C. § 1857(a)(3) (1970):

(a) The Congress finds—

• • • • •

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments[.]

⁷⁰ 42 U.S.C. § 1857c-2(a) (1970):

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

§ 1857f,⁷¹ and that the authority to redesignate gives these lands tremendous practical power over neighboring areas which might be hindered in their development because of designation of federal or Indian lands as Class I areas.⁷²

⁷¹ 42 U.S.C. § 1857f (1970):

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so * * *.

* * *

⁷² See 39 Fed. Reg. 42512 (Dec. 5, 1974):

Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State. Therefore, wherever a Class I area adjoins a Class II or III area, the potential growth restrictions, especially for power plant development, extends [sic] well beyond the Class I boundaries into the adjacent area. A similar situation exists, to a greater or lesser degree, wherever areas of different classification adjoin each other. Therefore, the area with the less restrictive classification should include an additional area at the periphery where it is clearly recognized that development will be somewhat restricted due to the adjacent "cleaner" area. As a result, a Class I redesignation could be fairly limited in size, yet the adjoining Class II or Class III areas would need to cover a substantial area in order to fully utilize the Class II or III increment. Again, it should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment.

EPA has responded that federal land managers and Indian governing bodies have an important legal interest in protecting the air quality of their lands, that redesignation may not be proposed without consultation with officials of the affected states,⁷³ and that the Administrator may disapprove redesignation if arbitrary and capricious disregard of the interests of other affected areas is demonstrated.⁷⁴ With regard to submission of federal facilities to state regulation, EPA notes that federal lands may be redesignated only to a more restrictive classification than that applicable to the entire state,⁷⁵ and thus cannot contribute to unwanted deterioration of air quality.

We pretermitt this question, as we find that the issue is not yet ripe for review.⁷⁶ No federal or Indian land has yet been redesignated, and to that extent we cannot be certain

⁷³ 40 C.F.R. § 52.21(c)(3)(iv), (v) (1975).

⁷⁴ 40 C.F.R. § 52.21(c)(3)(vi)(b), (c) (1975).

⁷⁵ 40 C.F.R. § 52.21(c)(3)(iv) (1975).

⁷⁶ See *Toilet Goods Ass'n Inc. v. Gardner*, 387 U.S. 158 (1967), in which cosmetic manufacturers had brought a pre-enforcement action to challenge the authority of the Commissioner of Food and Drugs to issue regulations under the Color Additive Amendments to the Federal Food, Drug, and Cosmetic Act. The regulation at issue authorized the Commissioner to suspend certification service to any person who denied the FDA free access to manufacturing information. Although the issue was purely legal, the Court found that, as framed, it was not appropriate for judicial resolution:

The regulation serves notice only that the Commissioner *may* under certain circumstances order inspection of certain facilities and data, and that further certification of additives *may* be refused to those who decline to permit a duly authorized inspection until they have complied in that regard. At this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order. The statutory authority asserted for the regulation is the power to promulgate regulations "for the efficient enforcement" of the Act, § 701(a). Whether the regulation is justified thus depends not only, as petitioners appear to suggest, on whether Congress refused to include a specific sec-

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how a conflict may evolve. If the Administrator were to approve, as replacements for these regulations, individual state plans which did not include the powers granted to federal land managers and Indian governing bodies, the problems foreseen by petitioners might never arise.

We note that reservation of power to federal land managers and Indian governing bodies should have no effect on present conduct; there appears to be no reason why economic development of any area should be hindered by the possibility that a nearby area may be redesignated in the future to a more restrictive classification. We therefore do not foresee any irreparable injury which may arise from deferral of this question until it arises in a more concrete context.

L. Are the regulations constitutional?

We find the arguments challenging the constitutionality of the nondeterioration regulations to be insubstantial. Regulation of air pollution clearly is within the power of the federal government under the commerce clause,⁷⁷ and

tion of the Act authorizing such inspections, although this factor is sure to be a highly relevant one, but also on whether the statutory scheme as a whole justified promulgation of the regulation. * * * This will depend not merely on an inquiry into statutory purpose, but concurrently on an understanding of what types of enforcement problems are encountered by the FDA, the need for various sorts of supervision in order to effectuate the goals of the Act, and the safeguards devised to protect legitimate trade secrets * * *. We believe that judicial appraisal of these factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here.

387 U.S. at 163-164 (emphasis in original).

⁷⁷ See *District of Columbia v. Train*, 172 U.S.App.D.C. 311, 328, 521 F.2d 971, 988 (1975); *Pennsylvania v. EPA*, 500 F.2d 246, 259 (3d Cir. 1974); *South Terminal Corp. v. EPA*, 504 F.2d 646, 677 (1st Cir. 1974).

we can see no basis on which to distinguish deterioration of air cleaner than national standards from pollution in other contexts.⁷⁸ Nor do we agree that the regulations bear no rational relationship to protection of public health and welfare and therefore violate the due process clause of the Fifth Amendment. There is a rational relationship between air quality deterioration and the public health and welfare,⁷⁹ and there is a proper legislative purpose⁸⁰ in prevention of significant deterioration of air quality. Neither can the regulations be construed as an unconstitutional "taking" under the Fifth Amendment, any more than existing emission control regulations represent such a "taking."⁸¹ The use of private land certainly is limited, but the

⁷⁸ Indeed, the vigorous objections that have been mounted against redesignation of federal lands or Indian lands are based on recognition that a pollution source can have air quality effects over a large area.

⁷⁹ See note 58 *supra*.

⁸⁰ See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-259 (1964), in which the Court held the Civil Rights Act of 1964 to be a valid exercise of congressional power under the commerce clause, and found the Act not barred by the Fifth Amendment:

Nor does the Act deprive appellant of liberty or property under the Fifth Amendment. The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. * * *

See also *Nebbia v. New York*, 291 U.S. 502, 537 (1934) (Fourteenth Amendment).

⁸¹ See *South Terminal Corp. v. EPA*, 504 F.2d 646, 678 (1st Cir. 1974), in which the court upheld a transportation control plan which mandated a 40% reduction in available off-street parking spaces:

[T]he Government has not taken title to the spaces, and the decision about alternative uses of the space has been left to the

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limitation is not so extreme as to represent an appropriation of the land.

The Tenth Amendment is not implicated either by infringement on the reserved powers of the states, *cf. National League of Cities v. Usery*, — U.S. —, 44 U.S. L. WEEK 4974 (June 24, 1976), or by any requirement of affirmative action, as in *District of Columbia v. Train*, 172 U.S.App.D.C. 311, 521 F.2d 971 (1975). The states retain broad discretion under the regulations to control the use of their land and the scope of their economic development, and are required to take no affirmative action. Preconstruction review under the regulations is conducted by the Administrator unless a state requests that responsibility be delegated to it. 40 C.F.R. § 52.21(d), (f) (1975).

Last, we find no merit to the argument that the congressional delegation of authority to EPA is unconstitutionally vague. There is substantial basis for the instant regulations in both the Clean Air Act and its legislative history, and we find the regulations to be a reasonable means of implementing the congressional intent.⁸² *See South Terminal Corp. v. EPA*, 504 F.2d 646, 676-677 (1st Cir. 1974).

owner. The takings clause is ordinarily not offended by regulation of uses, even though the regulation may severely or even drastically affect the value of the land or real property. If the highest-valued use of the property is forbidden by regulations of general applicability, no taking has occurred so long as other lower-valued, reasonable uses are left to the property's owner.
• • •

⁸² In *Lichter v. United States*, 334 U.S. 742, 785 (1947), the Court upheld a congressional grant of authority to the Secretary of War, the Secretary of the Navy, and the Chairman of the Maritime Commission to renegotiate contracts and to recover "excessive profits." The Court applied the following reasoning to the claim that the term "excessive profits" was unconstitutionally vague:

It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to

VI. CONCLUSION

We find no ground on which to disturb the regulations under review, and we therefore affirm the EPA "Prevention of Significant Air Quality Deterioration" regulations.⁸³ Our review of *Sierra Club v. Ruckelshaus* and subsequent events has revealed no substantial reason for rejection of that decision, and we hold that the nondeterioration regulations promulgated pursuant to that decision are both rational and in accordance with law.

Affirmed.

Circuit Judge WILKEY concurs in the result only.

infinitely variable conditions constitute the essence of the program. "If Congress shall lay down by legislative act an intelligible principle . . . such legislative action is not a forbidden delegation of legislative power." *Hampton Co. v. United States*, 276 U.S. 394, 409. Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied. "They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 104. • • •

⁸³ As noted above, *see pp.* [45a-48a], we do not decide the question whether reclassification of federal and Indian lands independent of state action may be unlawful.

APPENDIX B

39 Fed. Reg. 42509 *et seq.* (December 5, 1974) included the explanatory preamble set forth below (pp. 53a-75a *infra*) and the text of the "significant deterioration" regulations (40 C.F.R. §§ 50.01(d), (f), and 52.21). The text of the "significant deterioration" regulations within 39 Fed. Reg. 42509, *as amended*, 40 Fed. Reg. 2802 (January 16, 1975), 40 Fed. Reg. 25004 (June 12, 1975), and 40 Fed. 42011 (September 10, 1975) is set out at 75a-90a *infra*.

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

SUBCHAPTER C—AIR PROGRAMS

[FRL 302-4]

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

Prevention of Significant Air Quality Deterioration

On May 31, 1972 (37 FR 10842), the Administrator of the Environmental Protection Agency published initial approvals and disapprovals of State Implementation Plans submitted pursuant to section 110 of the Clean Air Act, as amended in 1970.

On November 9, 1972 (37 FR 23836), all State Implementation Plans were disapproved insofar as they failed to provide for the prevention of significant deterioration of existing air quality. This action was taken in response to a preliminary injunction issued by the District Court for the District of Columbia, which also required the administrator to promulgate regulations as to any state plan which either permits

(53a)

the significant deterioration of air quality in any portion of any state, or fails to take the measures necessary to prevent such significant deterioration.

Accordingly, on July 16, 1973 (38 FR 18986), an initial notice of proposed rulemaking was published which set forth four alternative plans for preventing significant deterioration, and which solicited widespread public involvement in all aspects of the significant deterioration issue. A series of public hearings were held and over 300 written comments were submitted in response to this proposal. The hearing records and the written comments are available for inspection at the EPA Freedom of Information Office, 401 M Street, SW., Washington, D.C.

Due to the lack of precise direction either in the Clean Air Act or in the Court order, the initial proposals focused on the conceptual basis for regulations. The comments received on the proposed regulations therefore tended primarily to discuss conceptual issues such as the roles of federal and state/local governments, rather than detailed comments regarding implementation of the regulations. Accordingly, on August 27, 1974 (39 FR 31000), the Administrator issued repropoed regulations in order to properly explore all aspects of this issue and to focus more clearly on procedural and technical issues.

The Administration has submitted for consideration an amendment to the Act which would eliminate the requirement for preventing significant deterioration of air quality. This amendment is pending before the Congress. Although EPA does not endorse this amendment, EPA seeks full public debate on the significant deterioration issue and in issuing these regulations does not intend to delay or influence consideration of this amendment. The regulations issued herein are necessary because the Court has ruled that the current

Clean Air Act requires the Administrator to prevent significant deterioration, and this requirement must be met even though it is possible that Congress may provide additional guidance and/or legislative changes in the future.

The regulations proposed on August 27, 1974, called for the establishment of "classes" of different allowable incremental increases in total suspended particulates (TSP) and sulfur dioxide (SO₂). Class I applied to areas in which practically any change in air quality would be considered significant; Class II applied to areas in which deterioration normally accompanying moderate well-controlled growth would be considered insignificant; and Class III applied to those areas in which deterioration up to the national standards would be considered insignificant. Under the proposed regulation, all areas of the country would be designated Class II initially, with provisions for allowing States to reclassify any area to accommodate the social, economic, and environmental needs and desires of the public.

The plan would be implemented through a preconstruction review of specified source categories to determine whether these sources would cause a violation of the appropriate increments. The new source review also included a provision requiring the use of best available control technology on sources covered by the regulation. Finally, the proposal provided procedures for public comment on each application for permission to construct and for delegating the responsibility for implementing the new source review procedures to States or local governmental units.

DISCUSSION OF PUBLIC COMMENTS

The August 27 proposal was criticized by environmental groups as being unresponsive to the District

Court's order in that it permits the deterioration of air quality up to the national standards in Class III regions. Although this result could also occur in Class I or Class II regions where the difference between existing air quality and the national standard is less than the prescribed air quality increment, all such comments focused on the provision for Class III areas. Unless "significant deterioration" is defined as a percentage of the "unused" air resource, any air quality increment plan, regardless of how small the increment is, could allow deterioration up to the national standard in some instances. As discussed in the preamble to the proposals of July 16, 1973, and August 27, 1974, air quality monitoring is presently concentrated in heavily polluted areas, with only scattered monitoring in relatively clean areas. Vast numbers of additional monitors will be necessary to precisely define existing air quality, making a plan that is dependent on a knowledge of existing air quality virtually unworkable. Therefore, the fact that air quality could, in some instances, increase to the national standard, does not, in the Administrator's opinion, make the August 27 proposal inconsistent with the Court's ruling.

Additional comments involving Class III areas indicated that economic and social factors should have no bearing on the definition of significant deterioration. These comments stated that EPA must consider only air quality factors and that a single nationwide definition of significant deterioration must be established. Such comments did not take issue with Agency statements made on July 16, 1973, and August 27, 1974 that the definition of significant deterioration is basically a subjective decision. None of the comments suggesting changes to the increments proposed by the Administrator, or proposing alternate plans, offered any justification for the numbers which were selected. Since the consideration of "air quality factors" alone

essentially leads to an arbitrary definition of what is "significant," this term only has meaning when the economic and social implications are analyzed and considered. Therefore, the Administrator believes that it is most important to recognize and consider these implications, since the consideration of air quality factors alone provides no basis for selecting one deterioration increment over another.

Even in the subjective terms that are required when considering only the environmental aspects, the contention that there must be a single definition of significant deterioration applicable nationwide does not appear to address the wide range of environmental needs which exist. Most of the comments implicitly recognized that there is a need to develop resources in presently clean areas of the country, and that significant deterioration regulations should not preclude all growth, but should ensure that growth occurs in an environmentally acceptable manner. However, there are some areas, such as national parks, where any deterioration would probably be viewed as significant. A single nationwide deterioration increment would not be able to accommodate these two situations.

Along these lines, comments were specifically requested in the proposal as to whether the Class II increment should be doubled. Power companies generally supported such a change, while other comments from the industrial sector indicated that the increments were adequate for well-controlled growth. Power companies indicated that many new plants would be much larger than those which would be allowed in a Class II area (approximately 1000 megawatts), and that the Class II increment ought to accommodate such development. None of the comments presented any reasons for permitting such development in a Class II rather than a Class III area, except that the initial

designation of all areas will be Class II. The Administrator continues to feel that a Class II increment should be compatible with moderate, well-controlled development in a nationwide context, and that large-scale development should be permitted only in conjunction with a conscious decision to redesignate the area as Class III.

Many comments also criticized the omission of carbon monoxide (CO), nitrogen oxides (NO_x), hydrocarbons (HC), and photochemical oxidants (O_x) from the regulations. As indicated on July 16, 1973, and August 27, 1974, and in previous actions involving indirect source review (38 FR 29893 at 29894, 39 FR 7270 at 7272, and 39 FR 25292 at 25295), existing analytical procedures are not adequate to determine the impact of individual sources on air quality concentrations of reactive pollutants (NO_x and HC/O_x). The only presently available technique for relating emissions to air quality for these pollutants is the area-wide proportional model used for demonstrating the adequacy of control strategies. The proportional model requires that measured air quality data be available; however, as indicated above, such data are very limited in presently clean areas (even more so than for TSP and SO₂). In contrast, the air quality concentration of stable pollutants can reasonably be estimated using a diffusion model and therefore measured air quality data are not necessary to determine the incremental air quality impact of an individual source. In addition, since the proportional model assumes that air quality is proportional to emissions, the key to analyzing the impact of an individual source focuses on the definition of baseline emissions. If the source would be located in a very clean area with virtually no baseline emissions, then the predicted air quality increase would be very large (when in fact it probably would not). If the source would be located in a large metro-

politan area and the baseline emissions are those of the entire metropolitan area, then the predicted impact of a single additional source would be very small. Therefore, the proportional model is adequate for control strategy development in urban areas where measured air quality data are available and the aggregate impact of controlling many sources is being analyzed. However, it is inappropriate for analyzing the incremental impact of individual new sources.

At this time, the only practical approach for dealing with these pollutants appears to be to minimize emissions as much as possible. The Federal Motor Vehicle Control Program accomplishes this for individual motor vehicles. New source performance standards (NSPS) have already been established under Part 60 of this chapter for many of the source categories subject to the regulation. Where practicable, emission limitations for CO, NO_x, and HC have been promulgated for those sources presently subject to Part 60. Although some of the source categories are not yet included in Part 60, either (1) those that are not covered are not significant emitters of CO, NO_x, or HC, or (2) control technology for these pollutants is unavailable or an emission limitation is impractical (e.g. HC emissions from coke ovens).

One additional step which could be taken to minimize emission of CO, NO_x, and HC appears to be in the area of minimizing vehicle miles of travel (VMT). Plans for reducing VMT and minimizing future VMT growth have been developed as part of the Transportation Control Plans (TCP) promulgated elsewhere in this chapter. Since the TCP's focus on major metropolitan areas, the flexibility available in designing these plans would be more limited when applied to rural and outlying areas. It is clear, however, that comprehensive transportation planning offers an appropriate mechanism for minimizing VMT growth in

such areas. It is not clear, however, how EPA might become involved in comprehensive transportation planning throughout the country under these regulations, although States may wish to consider such an approach when developing their own plans to prevent significant deterioration. States of course, are not precluded from including other more comprehensive measures for dealing with HC, CO, and NO_x in their own plans.

Some difficult additional questions arise as to how this concept of VMT minimization could be incorporated into these significant deterioration regulations. Would the addition of a VMT increment, similar to the air quality increment approach used in these regulations, be appropriate? Would a new source review of specific indirect sources be practical, or should the review apply to larger scale projects such as a new town or a large new development? The Administrator solicits additional comments on this issue and may modify the regulation at a later date if workable procedures in this area can be developed.

The August 27 proposal specified that all areas of the country, including those areas above the national standards, would be subject to the significant deterioration regulations, even though the District Court order only required the prevention of significant deterioration in areas presently below the national standards. This was done because it was not possible to specify in these regulations all areas of the country which exceed the national ambient air quality standards. In addition, there would be no practical impact of these significant deterioration regulations in areas above the standards, since emissions in such areas are being reduced under the state implementation plans, while these regulations provide for limited allowable increases in emissions.

Nonetheless, there were a number of comments requesting that these regulations specifically exempt all areas presently above the national standards. The regulations promulgated below provide for this exemption only with respect to the area classification requirements. The preconstruction review is still applicable in all areas of the country, in order to ensure that new sources be examined for their impact in presently clean areas which may be adjacent to areas that are above the national standards. In addition, the requirements for applying best available control technology are also applicable to all sources subject to review in order to minimize the deterioration caused by individual sources. This requirement is particularly important where a source in one State would use up a significant portion of the air quality increment in a neighboring State.

The exemption of areas from the classification requirements will be done on a county basis (or functionally equivalent area) and will be based on a determination by the State that the air quality in the county is pervasively above the national standard. No attempt has been made to define these counties in these regulations. Instead, States must notify the Administrator by June 1, 1975, of those areas which are exempt from the classification requirements.

There were a number of comments requesting clarification of the relationship of these regulations to other portions of the existing implementation plans, particularly the air quality maintenance plans (AQMP's) to be submitted by June, 1975. An air quality maintenance plans (AQHP's) to be submitted by June, 1975. An air quality maintenance area (AQMA) is an area designated by the Administrator that may have the potential for exceeding any national standard within the next 10-year period as a consequence of current

air quality and/or the projected growth rate of the area. The States are required to submit an analysis of the impact on air quality of projected growth in each designated potential problem area. Where maintenance problems are identified by this analysis, the states must also submit plans containing measures to ensure maintenance of national standards during the ensuing 10-year period. AQMA's have been proposed for specific pollutants and final designations will be published shortly. Where an AQMA has been designated because of projected problems in maintaining the NAAQS for either TSP or SO₂, the significant deterioration increment is applicable only to those portions of the AQMA which are cleaner than either standard. By design AQMA boundaries have been designated to include substantial areas which are relatively clean. This has been done to insure that the planning area corresponds to the entire area where projected new growth in emissions is likely to occur and where regional planning for public services, housing and employment is focused.

Although there seemed to be a general assumption that AQMA's should be designated as Class III, there are several situations where a State may wish to leave the clean air portions of an AQMA as Class II or even to redesignate the area to a Class I. This would limit peripheral growth so as to complement the goals of the AQMP and in this context, the significant deterioration would actually be a mechanism for partially implementing the AQMP. In addition, there are several clean air areas which have been proposed as AQMA's due to anticipated large-scale development of natural resources. A Class I or Class II designation for such areas would probably eliminate the need for an AQMP for TSP or SO₂, since the air quality constraint would be the Class I or Class II increment. Therefore, a "designation" of the AQMA for TSP

or SO₂ may be appropriate. In any case, the Administrator recommends that any proposed significant deterioration redesignation have boundaries consistent with AQMA boundaries to facilitate the development of the AQMA plan.

A Class III designation does not necessarily mean that an AQMP would be required. For example, a clean air area might be designated Class III on the basis of a marginal anticipated deterioration in air quality which exceeds the Class II increments. However, the anticipated resulting air quality would still be well below the national standards. If little additional development were anticipated over the subsequent 10-year period so as to threaten the national standards, no AQMP would be required.

Furthermore, it is important to recognize that area classifications do not necessarily imply current air quality or current land use patterns. Instead, classifications should reflect the desired degree of change from current levels and patterns.

A number of public comments indicated concern that these regulations would create a duplication of new source review procedures, which would require a source owner to apply to several different governmental agencies before he could commence construction.

Where the State assumes responsibility for carrying out the new source review procedure under these regulations, most of the concerns expressed above should be eliminated. Procedurally and administratively, the significant deterioration review is virtually identical to existing new source review procedures included in the implementation plan and, in fact, application could probably be made on the same forms. No additional sources would be covered by the significant deteriora-

tion review. The only difference between the two new source reviews is in the tests which must be met before approval will be granted. Instead of meeting only the emission limitations which are part of the applicable plan, sources covered by the significant deterioration review must also meet an emission limitation which is consistent with the application of best available control technology. The most restrictive emission limitation supersedes all others. In addition to not causing a violation of any national standard, sources covered by the significant deterioration review must not cause an applicable air quality increment to be exceeded. Technically, the calculations needed to determine if these additional tests will be met are very similar to those already being done. Therefore, where a State administers these regulations, integration with the existing plan should be relatively easy, resulting in only minor additional resource demands. If States do not assume responsibility for implementing these regulations, EPA, through its Regional Offices, will carry out the new source review as required by the Act. Since this may cause duplication of effort on the part of EPA and the States, as well as additional requirements for source owners, the Administrator strongly urges States to accept delegation of these regulations or to develop their own regulations pursuant to the guidance to be issued shortly pursuant to Part 51 of this chapter.

In response to public comments, the Administrator is considering the addition of other source categories, such as asphalt concrete plants and ferro-alloy plants, to these regulations. One possibility is to add those sources for which new source performance standards for particulate matter and sulfur dioxide have been proposed or promulgated under Part 60 of this chapter. A proposal to add other source categories will be issued shortly.

One comment indicated confusion as to what functions the Administrator intended to delegate to States under these regulations. The confusion apparently related to the definition of "Administrator" under paragraph (b)(3) as including the Administrator's "designated representative." Although the term "Administrator" is used in paragraph (c), relating to the approval of State redesignation, the Administrator does not intend to designate to a representative outside the Agency the review and approval functions under this paragraph. As indicated in paragraph (f), the only functions which will be delegated to States will be the preconstruction review under paragraphs (d) and (e).

A question was raised as to whether an area could have one classification for SO₂ and another for TSP. Different classifications for SO₂ and TSP may make sense in certain situations, and the Administrator does not intend to preclude this option.

Several public comments requested that the technical procedures for determining the air quality impact of a new source be specified by EPA. The techniques the Agency intends to use in most cases are set forth in "Guidelines for Air Quality Maintenance Planning and Analysis," Vols. 10 and 12. Volume 10, "Reviewing New Stationary Sources," pertains to the air quality impact of individual sources, while Vol. 12, "Applying Atmospheric Simulation Models to Air Quality Maintenance Areas," will be used to determine the impact of other growth and development in the area affected by the source. These documents are available for inspection at EPA's Regional Offices and the EPA Freedom of Information Center, 401 M Street, SW., Washington, D.C. 20460, and will be available shortly for general distribution through the National Technical Information Service, 5258 Port Royal Road, Springfield, Virginia 22151. The Administrator, or

States which will be implementing the preconstruction review as EPA's agent, is not required to use the techniques in these documents if other techniques are more appropriate in certain circumstances.

There was considerable divergence of opinion over the initial classification of all areas. Industrial groups generally supported an initial designation of Class III so as to minimize disruption of projects scheduled to commence construction in the near future. Environmental groups supported an initial designation of Class I, fearing that a Class II or III designation would permit air quality deterioration of some clean areas before States could act to redesignate areas to a more restrictive classification. The Administrator continues to feel that an initial Class II designation represents the most reasonable compromise between these widely differing positions. Also, since the regulations apply only to sources which commence construction after June 1, 1975, the Administrator feels that this deferral should reduce disruption to the industrial sector while permitting States sufficient time to consider reclassifying any area either to Class I or III before requests for approval must be acted upon.

There were several questions raised concerning the appropriate size of an area which should be considered for redesignation. Calculations have shown that because of the small air quality increments specified for Class I areas, these levels can be violated by a source located many miles inside an adjacent Class II or III area. For example, a power plant which just meets the Class II increment for SO_2 could under some conditions violate the Class I increment for SO_2 60 or more miles away. Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air quality increment either in the area where the source is to be located or in any neighboring

area in the State. Therefore, wherever a Class I area adjoins a Class II or III area, the potential growth restrictions, especially for power plant development, extends well beyond the Class I boundaries into the adjacent areas. A similar situation exists, to a greater or lesser degree, wherever areas of different classification adjoin each other. Therefore, the area with the less restrictive classification should include an additional area at the periphery where it is clearly recognized that development will be somewhat restricted due to the adjacent "cleaner" area. As a result, a Class I redesignation could be fairly limited in size, yet the adjoining Class II or Class III areas would need to cover a substantial area in order to fully utilize the Class II or III increment. Again, it should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment.

The distance a large source would need to be located away from a Class I boundary is more dependent on the meteorological conditions in the area rather than the size of the source. Where very long pollutant travel times from the source to the receptor are involved, the assumptions concerning the persistence of wind direction and atmospheric stability are critical. At some point, it can be assumed that a receptor will be virtually unaffected by a source, regardless of the source strength, since the critical meteorological conditions would not be expected to persist long enough to move the pollutants from source to receptor for any significant period of time. This distance is, of course, dependent on local meteorological conditions, but for most areas the maximum distance would be 60 to 100 miles.

CHANGES TO THE REGULATIONS

1. *Definition of Modified Source.* The term "expanded source" was used in the proposal in place of the more commonly used term "modified source" in order to specifically exclude from the preconstruction review sources which increase emissions solely due to switching from a low sulfur to a higher sulfur content fuel. The proposed definition of expanded source was related to whether a source increased emissions through a "major capital expenditure." This phrase was criticized by many as being too vague. Therefore, the general term "modified source" has been reinstated, along with a specific exemption for fuel conversion, which exemption is applicable only to the significant deterioration review procedures. The general definition of modified source in Part 52 is changed slightly to be more specific and to be consistent with the definition used in Part 60. Changes to the definition of modification in Part 60 were proposed on October 15, 1974 (39 FR 36946) and comments on this proposal are presently being analyzed. It is the Administrator's intent to change the definition of modification under Part 52 to be consistent with the final definition of this term under Part 60.

These changes are not intended to modify the applicability of either the proposed significant deterioration regulations or other new source review procedures promulgated elsewhere in Part 52.

2. *Definition of best available control technology.* Since this term may be used elsewhere in Part 52 in the future, it has been defined in the general definitions section of Part 52. The definition is consistent with the wording used in the August 27 proposal. It should be noted that new source performance standards (NSPS) may only apply to certain affected facilities within a large source. For example, only basic oxygen

process furnaces in a steel mill are presently covered by NSPS, while blast furnaces, scarfing operations and other significant sources within the mill are not presently covered. BACT must be determined for these facilities on a case-by-case basis until such time as NSPS are issued for these other facilities.

3. *Definition of baseline air quality concentration.* The proposal intended to establish the baseline air quality as that air quality existing as of the effective date of regulation, adjusted to include air resource commitments resulting from approval of other air pollution sources pursuant to existing new source review procedures in the plan. The definition of baseline air quality has been clarified to reflect this intent and the calculation has been simplified by specifying the use of 1974 air quality data rather than 1973 data. No substantive change is intended by this revision.

4. *Conditions for applying for redesignation of areas.* In order that the Administrator have an adequate basis for determining whether an application to redesignate an area should be approved or disapproved, a provision has been added to paragraph (c) (3)(ii) to require that the necessary information be a part of the hearing record on the proposed designation. Specifically, the hearing record must show that the social, environmental, and economic effects of the proposed redesignation have been evaluated for the area being reclassified as well as for adjacent areas and that regional and national interests have been considered. The Administrator will provide additional guidance to assist States in developing their redesignation proposals and analyzing the impact of such redesignations.

5. *State reclassification of Federal and Indian Lands.* Various public comments indicate that Federal lands should be subject to State jurisdiction. EPA did not intend to preclude State redesignations provided

that the Federal Land Manager can elect to keep the air quality over Federal lands in a more pristine condition than the State might designate. Therefore, the regulations have been revised to subject Federal lands to State redesignations but reserve to the Federal Land Manager the authority to subject such lands to a more stringent designation. This approach is consistent with section 118 of the Clean Air Act (42 U.S.C. 1857f) which requires that Federal agencies having jurisdiction over any property or facility meet substantive State air pollution control standards and limitations. There is nothing in the Clean Air Act or the legislative history of that Act that indicates the Congress intended to preclude the Federal Government from meeting more restrictive standards than are imposed by the States. This provision also ensures that national forests and parks can be protected by the Federal Government from deterioration of air quality. The different treatment accorded lands of exclusive Federal jurisdiction has been eliminated since the revised regulations make it clear that the Federal Government can protect air quality over all Federal lands. In accordance with Executive Order 11752, these regulations do not require Federal facilities to comply with State or local administrative procedures with respect to pollution abatement and control. Review of new sources on Federal lands is reserved to EPA, except as State review is permitted by a Federal Land Manager with respect to activities conducted under Federal leases.

The State of New Mexico commented that the proposed regulations appeared to take authority away from the States to regulate air pollution over Indian lands. These regulations were not intended to alter the present legal relationships between the States and Indian Reservations within the States. As these relationships vary from State to State, EPA has not at-

tempted to define such relationships but has modified the proposed regulations to clarify that there is no intent to alter these relationships. Where States have not assumed jurisdiction over Indian lands, the regulations provide that the Indian governing body may propose redesignations to the Administrator. Boundary problems between Indian and State lands are dealt with in the same way that boundary problems between two States are dealt with, as discussed below. This is consistent with the independent status of Indian lands not subject to State laws.

6. *Public comment on proposed redesignations.* In order to permit the public an opportunity to comment on whether a proposed redesignation should be approved or disapproved, the Administrator will publish all proposed redesignations in the FEDERAL REGISTER as proposed rulemaking and provide at least 30 days for submission of public comments.

7. *Preconstruction review and BACT in Class III areas.* Several public comments criticized the proposed regulations for exempting sources in Class III areas from preconstruction review. It was pointed out that there would be no procedure to prevent construction of a source in a Class III area which would violate an increment in an adjacent Class I or II area. Therefore, the regulations promulgated below require that new sources, wherever they are located, must be reviewed to determine the impact on air quality in adjacent regions.

In order to minimize the deterioration caused by individual sources, the proposal has been modified to make the BACT requirements applicable wherever the source is located, not just in Class I or II areas. Since a source located many miles away from a Class I area could easily use up the entire Class I increment, as discussed below, the necessity to minimize emis-

sions as much as possible in all areas is particularly important.

8. *Determination of allowable air quality increment.* The provisions of paragraph (d)(2)(i) have been modified to be more specific and to specify that reduction of emissions from existing sources which contributed to the baseline air quality concentration should be accounted for in determining the unused portion of the allowed air quality increment.

9. *EPA review of state redesignations.* The proposed regulations did not adequately cover problems created when a State or Indian Governing Body wishes to designate one or more of its areas in such a way that it will have a negative impact on other States or Indian Reservations. These regulations provide that a State or Indian Governing Body must take into account the effect of proposed redesignations on other States, Indian Reservations, and regional and national interests. Where no State or Indian Governing Body protests the redesignation of another State or Indian Reservation, the Administrator will only review the redesignation to determine whether it is arbitrary and capricious. However, where a State or Indian Governing Body protests a redesignation to the State proposing the redesignation and to the Administrator, the Administrator will take an expanded role of review in which he will balance the competing interests involved.

10. *Specification of emission limitation.* In order to ensure that the requirement for applying BACT is properly implemented, the provisions of paragraph (d)(2)(ii) have been modified to require that an emission limitation be established as a condition to approval. This places the emphasis on emissions rather than the presence of any particular control equipment. This change also makes the BACT requirement for

sources not covered by NSPS more consistent with the NSPS requirements. However, if the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an emission standard infeasible, he may instead prescribe a design or equipment standard requiring the application of best available control technology. Such standard shall to the degree possible set forth the emission reductions achievable by implementation of such design or equipment, and shall provide for compliance by means which achieve equivalent results.

11. *Responsibility for performing air quality impact analysis.* A number of public comments suggested that the reviewing agency analyze the air quality impact of additional growth that has occurred in the vicinity of the proposed source since the reviewing agency is more likely to have the necessary data which is needed. The Administrator has concluded that it would be more appropriate for the reviewing agency to perform the air quality impact analysis based on information submitted by the applicant. This change will eliminate the uncertainty which was expressed concerning the requirement that the applicant analyze the air quality impact of general growth and development "in the area affected by the proposed source," since the reviewing agency will define this area and perform the calculations required. Also the provisions of paragraph (d)(3) do not require the applicant to submit growth data with each application. However, the reviewing agency may request such data from the applicant in cases where it does not have the necessary information and will specify the area over which such information is required.

12. *Procedures for public participation.* The procedure specified in paragraph (e) for public comment

on an application to construct have been modified to be consistent with the procedures contained in EPA's regulations for indirect source review (39 FR 25292). The changes allow the reviewing agency to require additional information, where necessary, and permit the applicant to respond to public comments involving his application to construct.

13. *Sources subject to review.* As proposed on August 27, several of the 19 source categories subject to the preconstruction review appeared to be restricted to an individual process (e.g. Kraft pulp mill recovery furnaces) rather than all emission points on the premises. The wording has been changed to be consistent with the listing of the other source categories and to make clear that all emission points associated with a stationary source must be considered in determining whether the source will violate an applicable air quality increment. This change allows sintering plants to be dropped from the list, since sintering operations will be covered under the primary metals industries which are subject to review under these regulations.

A detailed explanation of the technical and policy considerations which form the basis for these regulations is being prepared. Upon completion, the Administrator will publish a notice in the *FEDERAL REGISTER* announcing the availability of this information for public inspection.

These regulations will be effective January 6, 1975 and will be applicable to sources commencing construction on or after June 1, 1975.

(Secs. 110(e) and 301(a) of the Clean Air Act as amended [42 U.S.C. 1857 c-5(c) and 1857 g(a)])

Dated: November 27, 1974.

RUSSELL E. TRAIN,
Administrator.

Subpart A, Part 52, Chapter I, Title 40, Code of Federal Regulations, is amended as follows:

1. In § 52.01, paragraph (d) is revised and paragraph (f) is added. As amended § 52.01 reads as follows:

§ 52.01 Definitions.

* * * *

(d) The phrases "modification" or "modified source" mean any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under Part 50 of this chapter or which results in the emission of any such pollutant not previously emitted, except that:

(1) Routine maintenance, repair, and replacement shall not be considered a physical change, and

(2) The following shall not be considered a change in the method of operation:

(i) An increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(ii) An increase in the hours of operation;

(iii) Use of an alternative fuel or raw material, if prior to the effective date of a paragraph in this Part which imposes conditions on or limits modifications, the source is designed to accommodate such alternative use.

* * * *

(f) The term "best available control technology," as applied to any affected facility subject to Part 60 of this chapter, means any emission control device or technique which is capable of limiting emissions to the levels proposed or promulgated pursuant to Part 60

of this chapter. Where no standard of performance has been proposed or promulgated for a source or portion thereof under Part 60, best available control technology shall be determined on a case-by-case basis considering the following:

- (1) The process, fuels, and raw material available and to be employed in the facility involved,
- (2) The engineering aspects of the application of various types of control techniques which have been adequately demonstrated,
- (3) Process and fuel changes,
- (4) The respective costs of the application of all such control techniques, process changes, alternative fuels, etc.,
- (5) Any applicable State and local emission limitations, and
- (6) Locational and siting considerations.

* * * * *

§ 52.21 Significant deterioration of air quality.

(a) *Plan disapproval.* Subsequent to May 31, 1972, the Administrator reviewed State implementation plans to determine whether or not the plans permit or prevent significant deterioration of air quality in any portion of any State where the existing air quality is better than one or more of the secondary standards. The review indicates that State plans generally do not contain regulations or procedures specifically addressed to this problem. Specific disapprovals are listed, where applicable, in Subparts B through DDD of this part. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligations

of States, emission sources, or other persons with respect to all portion of plans approved or promulgated under this part.

(b) *Definitions.* For the purposes of this section:

(1) "Facility" means an identifiable piece of process equipment. A stationary source is composed of one or more pollutant-emitting facilities.

(2) The phrase "Administrator" means the Administrator of the Environmental Protection Agency or his designated representative.

(3) The phrase "Federal Land Manager" means the head, or his designated representative, of any Department or Agency of the Federal Government which administers federally-owned land, including public domain lands.

(4) The phrase "Indian Reservation" means any federally-recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

(5) The phrase "Indian Governing Body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

(6) "Construction" means fabrication, erection or installation of a stationary source.

(7) "Commenced" means that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

(c) *Area designation and deterioration increment.*

(1) The provisions of this paragraph have been incor-

porated by reference into the applicable implementation plans for various States, as provided in Subparts B through DDD of this part. Where this paragraph is so incorporated, the provisions shall also be applicable to all lands owned by the Federal Government and Indian Reservations located in such State. The provisions of this paragraph do not apply in those counties or other functionally equivalent areas that pervasively exceeded any national ambient air quality standards during 1974 for sulfur dioxide or particulate matter and then only with respect to such pollutants. States may notify the Administrator at any time of those areas which exceeded the national standards during 1974 and therefore are exempt from the requirements of this paragraph.

(2)(i) For purposes of this paragraph, areas designated as Class I or II shall be limited to the following increases in pollutant concentration occurring since January 1, 1975:

Area designations

Pollutant	Class I ($\mu\text{g}/\text{m}^3$)	Class II ($\mu\text{g}/\text{m}^3$)
Particulate matter:		
Annual geometric mean	5	10
24-hr. maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hr. maximum	5	100
3-hr. maximum	25	700

(ii) For purposes of this paragraph, areas designated as Class III shall be limited to concentrations of particulate matter and sulfur dioxide no greater than the national ambient air quality standards.

(iii) The air quality impact of sources granted approval to construct or modify prior to January 1, 1975 (pursuant to the approved new source review procedures in the plan) but not yet operating prior to January 1, 1975, shall not be counted against the air quality increments specified in paragraph (c)(2)(i) of this section.

(3)(i) All areas are designated Class II as of the effective date of this paragraph. Redesignation may be proposed by the respective States, Federal Land Managers, or Indian Governing Bodies, as provided below, subject to approval by the Administrator.

(ii) The State may submit to the Administrator a proposal to redesignate areas of the State Class I, Class II, or Class III, provided that:

(a) At least one public hearing is held in or near the area affected and this public hearing is held in accordance with procedures established in § 51.4 of this chapter, and

(b) Other States, Indian Governing Bodies, and Federal Land Managers whose lands may be affected by the proposed redesignation are notified at least 30 days prior to the public hearing, and

(c) A discussion of the reasons for the proposed redesignation is available for public inspection at least 30 days prior to the hearing and the notice announcing the hearing contains appropriate notification of the availability of such discussion, and

(d) The proposed redesignation is based on the record of the State's hearing, which must reflect the basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the area being proposed for reded-

ignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interests.

(e) The redesignation is proposed after consultation with the elected leadership of local and other sub-state general purpose governments in the area covered by the proposed redesignation.

(iii) Except as provided in subdivision (iv) of this subparagraph, a State in which lands owned by the Federal Government are located may submit to the Administrator a proposal to redesignate such lands Class I, Class II, or Class III in accordance with subdivision (ii) of the subparagraph provided that:

(a) The redesignation is consistent with adjacent State and privately owned land, and

(b) Such redesignation is proposed after consultation with the Federal Land Manager.

(iv) Notwithstanding subdivision (iii) of this subparagraph, the Federal Land Manager may submit to the Administrator a proposal to redesignate any Federal lands to a more restrictive designation than would otherwise be applicable provided that:

(a) The Federal Land Manager follows procedures equivalent to those required of States under paragraph (c) (3) (ii) and,

(b) Such redesignation is proposed after consultation with the State(s) in which the Federal Land is located or which border the Federal land.

(v) Nothing in this section is intended to convey authority to the States over Indian Reservations where States have not assumed such authority under other laws nor is it intended to deny jurisdiction which States have assumed under other laws. Where a State

has not assumed jurisdiction over an Indian Reservation the appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III, provided that:

(a) The Indian Governing Body follows procedures equivalent to those required of States under paragraph(c) (3)(ii) and,

(b) Such redesignation is proposed after consultation with the State(s) in which the Indian Reservation is located or which border the Indian Reservation and, for those lands held in trust, with the approval of the Secretary of the Interior.

(vi) The Administrator shall approve, within 90 days, any redesignation proposed pursuant to this subparagraph as follows:

(a) Any redesignation proposed pursuant to subdivisions (ii) and (iii) of this subparagraph shall be approved unless the Administrator determines (1) that the requirements of subdivisions (ii) and (iii) of this subparagraph have not been complied with, (2) that the state has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(d) of this paragraph, or (3) that the State has not requested and received delegation of responsibility for carrying out the new source review requirements of paragraphs (d) and (e) of this section.

(b) Any redesignation proposed pursuant to subdivision (iv) of this subparagraph shall be approved unless he determines (1) that the requirements of subdivision (iv) of this subparagraph have not been complied with, or (2) that the Federal Land Manager has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3) (ii)(d) of this paragraph.

(c) Any redesignation submitted pursuant to subdivision (v) of this subparagraph shall be approved unless he determines (1) that the requirements of subdivision (v) of this subparagraph have not been complied with, or (2) that the Indian Governing Body has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(d) of this paragraph.

(d) Any redesignation proposed pursuant to this paragraph shall be approved only after the Administrator has solicited written comments from affected Federal agencies and Indian Governing Bodies and from the public on the proposal.

(e) Any proposed redesignation protested to the proposing State, Indian Governing Body, or Federal Land Manager and to the Administrator by another State or Indian Governing Body because of the effects upon such protesting State or Indian Reservation shall be approved by the Administrator only if he determines that in his judgment the redesignation appropriately balances considerations of growth anticipated in the area proposed to be redesignated; the social, environmental and economic effects of such redesignation upon the area being redesignated and upon other areas and States; and any impacts upon regional or national interests.

(f) The requirements of paragraph (c)(3)(vi)(a) (3) that a State request and receive delegation of the new source review requirements of this section as a condition to approval of a proposed redesignation, shall include as a minimum receiving the administrative and technical functions of the new source review. The Administrator will carry out any required enforcement action in cases where the State does not have adequate legal authority to initiate such actions. The Administrator may waive the requirements of

paragraph (c)(3)(vi)(a)(3) if the State Attorney-General has determined that the State cannot accept delegation of the administrative/technical functions.

(vii) If the Administrator disapproves any proposed area designation under this subparagraph, the State, Federal Land Manager or Indian Governing Body, as appropriate, may resubmit the proposal after correcting the deficiencies noted by the Administrator or reconsidering any area designation determined by the Administrator to be arbitrary and capricious.

(d) *Review of new sources.* (1) The provisions of this paragraph have been incorporated by reference into the applicable implementation plans for various States, as provided in Subparts B through DDD of this part. Where this paragraph is so incorporated, the requirements of this paragraph apply to any new or modified stationary source of the type identified below which has not commenced construction or modification prior to June 1, 1975 except as specifically provided below. A source which is modified, but does not increase the amount of sulfur oxides or particulate matter emitted, or is modified to utilize an alternative fuel, or higher sulfur content fuel, shall not be subject to this paragraph.

(i) Fossil-Fuel Steam Electric Plants of more than 1000 million B.T.U. per hour heat input.

(ii) Coal Cleaning Plants.

(iii) Kraft Pulp Mills.

(iv) Portland Cement Plants.

(v) Primary Zinc Smelters.

(vi) Iron and Steel Mills.

(vii) Primary Aluminum Ore Reduction Plants.

(viii) Primary Copper Smelters.

(ix) Municipal Incinerators capable of charging more than 250 tons of refuse per 24 hour day.

(x) Sulfuric Acid Plants.

(xi) Petroleum Refineries.

(xii) Lime Plants.

(xiii) Phosphate Rock Processing Plants.

(xiv) By-Product Coke Oven Batteries.

(xv) Sulfur Recovery Plants.

(xvi) Carbon Black Plants (furnace process).

(xvii) Primary Lead Smelters.

(xviii) Fuel Conversion Plants.

(xix) Ferroalloy production facilities commencing construction after October 5, 1975.

(2) No owner or operator shall commence construction or modification of a source subject to this paragraph unless the Administrator determines that, on the basis of information submitted pursuant to subparagraph (3) of this paragraph:

(i) The effect on air quality concentration of the source or modified source in conjunction with the effects of growth and reduction in emissions after January 1, 1975, of other sources in the area affected by the proposed source, will not violate the air quality increments applicable in any other areas. The analysis of emissions growth and reduction after January 1, 1975, or other sources in the areas affected by the proposed source shall include all new and modified sources granted approval to construct pursuant to this paragraph; reduction in emissions from existing sources which contributed to air quality during all or part of 1974; and general commercial, residential, industrial, and other sources of emissions growth not

exempted by paragraph (c)(2)(iii) of this section which has occurred since January 1, 1975.

(ii) The new or modified source will meet an emission limit, to be specified by the Administrator as a condition to approval, which represents that level of emission reduction which would be achieved by the application of best available control technology, as defined in § 52.01(f), for particulate matter and sulfur dioxide. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an emission standard infeasible, he may instead prescribe a design or equipment standard requiring the application of best available control technology. Such standard shall to the degree possible set forth the emission reductions achievable by implementation of such design or equipment, and shall provide for compliance by means which achieve equivalent results.

(iii) With respect to modified sources, the requirements of subparagraph (2)(ii) of this paragraph shall be applicable only to the facility or facilities from which emissions are increased.

(3) In making the determinations required by paragraph (d)(2) of this section, the Administrator shall, as a minimum, require the owner or operator of the source subject to this paragraph to submit: site information; plans, description, specifications, and drawings showing the design of the source; information necessary to determine the impact that the construction or modification will have on sulfur dioxide and particulate matter air quality levels; and any other information necessary to determine that best available control technology will be applied. Upon request of the Administrator, the owner or operator of the source shall also provide information on the

nature and extent of general commercial residential, industrial, and other growth which has occurred in the area affected by the source's emissions (such area to be specified by the Administrator) since January 1, 1975.

(4)(i) Where a new or modified source is located on Federal lands, such source shall be subject to the procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be in addition to applicable procedures conducted by the Federal Land Manager for administration and protection of the affected Federal Lands. Where feasible, the Administrator will coordinate his review and hearings with the Federal Land Manager to avoid duplicate administrative procedures.

(ii) New or modified sources which are located on Indian Reservations shall be subject to procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be administered by the Administrator in cooperation with the Secretary of the Interior with respect to lands over which the State has not assumed jurisdiction under other laws.

(iii) Whenever any new or modified source is subject to action by a Federal Agency which might necessitate preparation of an environmental impact statement pursuant to the National Environmental Policy Act (42 U.S.C. 4321), review by the Administrator conducted pursuant to this paragraph shall be coordinated with the broad environmental reviews under that Act, to the maximum extent feasible and reasonable.

(5) Where an owner or operator has applied for permission to construct or modify pursuant to this paragraph and the proposed source would be located in an area which has been proposed for redesignation

to a more stringent class (or the State, Indian Governing Body, or Federal Land Manager has announced such consideration), approval shall not be granted until the Administrator has acted on the proposed redesignation.

(e) *Procedures for public participation.* (1) (i) Within 20 days after receipt of an application to construct, or any addition to such application, the Administrator shall advise the owner or operator of any deficiency in the information submitted in support of the application. In the event of such a deficiency, the date of receipt of the application for the purpose of paragraph (e) (1) (ii) of this section shall be the date on which all required information is received by the Administrator.

(ii) Within 30 days after receipt of a complete application, the Administrator shall;

(a) Make a preliminary determination whether the source should be approved, approved with conditions, or disapproved.

(b) Make available in at least one location in each region in which the proposed source would be constructed, a copy of all materials submitted by the owner or operator, a copy of the Administrator's preliminary determination and a copy or summary of other materials, if any, considered by the Administrator in making his preliminary determination; and

(c) Notify the public, by prominent advertisement in newspaper of general circulation in each region in which the proposed source would be constructed, of the opportunity for written public comment on the information submitted by the owner or operator and the Administrator's preliminary determination on the approvability of the source.

(iii) A copy of the notice required pursuant to this subparagraph shall be sent to the applicant and to officials and agencies having cognizance over the locations where the source will be situated as follows: State and local air pollution control agencies, the chief executive of the city and county; any comprehensive regional land use planning agency; and any State, Federal Land Manager or Indian Governing Body whose lands will be significantly affected by the source's emissions.

(iv) Public comments submitted in writing within 30 days after the date such information is made available shall be considered by the Administrator in making his final decision on the application. No later than 10 days after the close of the public comment period, the applicant may submit a written response to any comments submitted by the public. The Administrator shall consider the applicant's response in making his final decision. All comments shall be made available for public inspection in at least one location in the region in which the source would be located.

(v) The Administrator shall take final action on an application within 30 days after the close of the public comment period. The Administrator shall notify the applicant in writing of his approval, conditional approval, or denial of the application, and shall set forth his reasons for conditional approval or denial. Such notification shall be made available for public inspection in at least one location in the region in which the source would be located.

(vi) The Administrator may extend each of the time periods specified in paragraph (e)(1) (ii), (iv), or (v) of this section by no more than 30 days or such other period as agreed to by the applicant and the Administrator.

(2) Any owner or operator who constructs, modifies, or operates a stationary source not in accordance with the application, as approved and conditioned by the Administrator, or any owner or operator of a stationary source subject to this paragraph who commences construction or modification after June 1, 1975, without applying for and receiving approval hereunder, shall be subject to enforcement action under section 113 of the Act.

(3) Approval to construct or modify shall become invalid if construction or expansion is not commenced within 18 months after receipt of such approval or if construction is discontinued for a period of 18 months or more. The Administrator may extend such time period upon a satisfactory showing that an extension is justified.

(4) Approval to construct or modify shall not relieve any owner or operator of the responsibility to comply with the control strategy and all local, State, and Federal regulations which are part of the applicable State Implementation Plan.

(f) *Delegation of authority.* (1) The Administrator shall have the authority to delegate responsibility for implementing the procedures for conducting source review pursuant to paragraphs (d) and (e), in accordance with subparagraphs (2), (3), and (4) of this paragraph.

(2) Where the Administrator delegates the responsibility for implementing the procedures for conducting source review pursuant to this section to any Agency, other than a regional office of the Environmental Protection Agency, the following provisions shall apply:

(i) Where the agency designated is not an air pollution control agency, such agency shall consult with the appropriate State and local air pollution control

agency prior to making any determination required by paragraph (d) of this section. Similarly, where the agency designated does not have continuing responsibilities for managing land use, such agency shall consult with the appropriate State and local agency which is primarily responsible for managing land use prior to making any determination required by paragraph (d) of this section.

(ii) A copy of the notice pursuant to paragraph (e)(1)(ii)(c) of this section shall be sent to the Administrator through the appropriate regional office.

(3) In accordance with Executive Order 11752, the Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be delegated, other than to a regional office of the Environmental Protection Agency, for new or modified sources which are owned or operated by the Federal government or for new or modified sources located on Federal lands; except that, with respect to the latter category, where new or modified sources are constructed or operated on Federal lands pursuant to leasing or other Federal agreements, the Federal Land Manager may at his discretion, to the extent permissible under applicable statutes and regulations, require the lessee or permittee to be subject to a designated State or local agency's procedures developed pursuant to paragraphs (d) and (e) of this section.

(4) The Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be redelegated, other than to a regional office of the Environmental Protection Agency, for new or modified sources which are located on Indian reservations except where the State has assumed jurisdiction over such land under other laws, in which case the Administrator may delegate his authority to the States in accordance with subparagraphs (2), (3), and (4) of this paragraph.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1975

No. 74-2063

SIERRA CLUB, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*

THE DAYTON POWER & LIGHT CO., ET AL., *Intervenors*

No. 74-2079

SIERRA CLUB, ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*

No. 75-1368

PUBLIC SERVICE COMPANY OF COLORADO, ET AL., *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent

SIERRA CLUB, ET AL., *Intervenors*

No. 75-1369

UTAH POWER & LIGHT COMPANY, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

SIERRA CLUB, ET AL., *Intervenors*

(91a)

92a

No. 75-1370

STATE OF NEW MEXICO, EX REL., NEW MEXICO
ENVIRONMENTAL IMPROVEMENT AGENCY, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

SIERRA CLUB, ET AL., *Intervenors*

No. 75-1371

PACIFIC COAL GASIFICATION COMPANY, ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

SIERRA CLUB, ET AL., *Intervenors*

No. 75-1372

UTAH INTERNATIONAL, INC., *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

SIERRA CLUB, ET AL., *Intervenors*

No. 75-1575

INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL.,
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent

SIERRA CLUB, ET AL., *Intervenors*

No. 75-1663

THE DAYTON POWER & LIGHT COMPANY, ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

SIERRA CLUB, ET AL., *Intervenors*

93a

No. 75-1664

BUCKEYE POWER, INC., ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*

SIERRA CLUB, ET AL., *Intervenors*

[No. 75-1665]

AMERICAN PETROLEUM INSTITUTE, ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

SIERRA CLUB, ET AL., *Intervenors*

No. 75-1666

ALABAMA POWER COMPANY, ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

SIERRA CLUB, ET AL., *Intervenors*

No. 75-1763

MONTANA POWER COMPANY, ET AL., *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent

SIERRA CLUB, ET AL., *Intervenors*

No. 75-1764

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
AND POWER DISTRICT, ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*
SIERRA CLUB, ET AL., *Intervenors*

PETITIONS FOR REVIEW OF REGULATIONS PROMULGATED BY THE
ENVIRONMENTAL PROTECTION AGENCY

Before: WRIGHT, ROBINSON and WILKEY, *Circuit Judges*

Judgment

These causes came on to be heard on petitions for review of regulations promulgated by the Environmental Protection Agency and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the regulations on review herein are hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: August 2, 1976

Opinion for the Court filed by Circuit Judge Wright.
Circuit Judge Wilkey concurs in the result only.

APPENDIX D

Relevant excerpts from the Constitution of the United States are as follows:

ARTICLE. I.

SECTION. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * * *

ARTICLE. IV.

* * * *

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

* * * *

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

* * * *

(95a)

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

• • • •

APPENDIX E

Relevant excerpts from the Clean Air Act, *as amended*, 42 U.S.C. § 1857 *et seq.*, are as follows:

§ 1857. [§ 101.] Congressional findings; purposes of subchapter

(a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

* * * *

§ 1857c—2. [§ 107.] Air quality control regions—Responsibility of State for air quality; submission of implementation plan

(a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

* * * *

§ 1857c—3. [§ 108.] Air quality criteria and control techniques—Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(a) (1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) which in his judgment has an adverse effect on public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

* * * *

§ 1857c—4. [§ 109.] National primary and secondary ambient air quality standards; promulgation; procedure

(a) (1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national

primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1) (B) of this subsection shall apply to the promulgation of such standards.

(b) (1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary stand-

ards may be revised in the same manner as promulgated.

§ 1857c—5. [§ 110.] State implementation plans for national primary and secondary ambient air quality standards—Submission to Administrator; time for submission; State procedures; required contents of plans for approval by Administrator; approval of revised plan by Administrator

(a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 1857c—4 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines

that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan, or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for inter-governmental cooperation, including measures necessary to insure that emissions of air pollutants

from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 1857h—1 of this title, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3) (A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(4) The procedure referred to in paragraph (2) (D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 1857c—6 of this title will apply at any location which the State determines will prevent the attainment or maintenance within any air quality con-

trol region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

Extension of period for submission of plan implementing national secondary ambient air quality standard

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

Preconditions for preparation and publication by Administrator of proposed regulations setting forth an implementation plan; hearings for proposed regulations; promulgation of regulations by Administrator; transportation regulations study and report; parking surcharge; suspension authority

(c) (1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

• • • •

Applicable implementation plan

(d) For purposes of this chapter, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) of this section or promulgated under subsection (c) of this section and which implements a national primary or secondary ambient air quality standard in a State.

• • • •

§ 1857c—6. [§ 111.] Standards of performance for new stationary sources—Definitions

(a) For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emis-

sion reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

Publication and revision by Administrator of list of categories of stationary sources; inclusion of category in list; publication of proposed regulations by Administrator establishing standards for new sources within category; promulgation and revision of standards; differentiation within categories of new sources; issuance of information on pollution control techniques; applicability to new sources owned or operated by United States

(b) (1) (A) The Administrator shall, within 90 days after December 31, 1970, publish (and from

time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare.

(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modification as he deems appropriate. The Administrator may, from time to time, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

Implementation and enforcement by State; procedure; delegation of authority of Administrator to State; enforcement power of Administrator unaffected

(c) (1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards (except with respect to new sources owned or operated by the United States).

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

Emission standards for any existing source for any air pollutant; submission of State plan to Administrator establishing, implementing and enforcing standards; authority of Administrator to prescribe State plan; authority of Administrator to enforce State plan; procedure

(d) (1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 1857c—5 of this title under which each State shall submit to the Administrator a plan which (A) establishes emission standards for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 1857c—3(a) or 1857c—7(b) (1) (A) of this title but (ii) to which a standard of performance under subsection (b) of this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such emission standards.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 1857c—5(e) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 1857c—8 and 1857c—9 of this title with respect to an implementation plan.

Prohibited acts

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

* * * *

§ 1857d—1. [§ 116.] Retention of State authority

Except as otherwise provided in sections 1857c—10(c), (e), and (f), 1857f—6a, 1857—6c(e)(4), and 1857f—11 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 1857c—6 or section 1857c—7 of this title, such State or political subdivision may not adopt or enforce any emission stand-

ard or limitation which is less stringent than the standard or limitation under such plan or section.

* * * *

§ 1857f. [§ 118.] Control and abatement of air pollution from Federal facilities: compliance of Federal departments, etc., with Federal, State, interstate, and local requirements; exemption by President of any emission source from any executive branch department, etc.; report to Congress

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 1857c—6 of this title, and an exemption from section 1857c—7 of this title may be granted only in accordance with section 1857c—7(e) of this title. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The

President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

• • • •

APPENDIX F

Relevant excerpts from the 1963 and 1967 versions of the federal Clean Air Act are as follows:

[PUBLIC LAW 88-206; 77 STAT. 392 (1963).]

FINDINGS AND PURPOSES

“SECTION 1. (a) The Congress finds—

• • • •

“(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

• • • •

“(b) The purposes of this Act are—

“(1) to protect the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population;

• • • •

[PUBLIC LAW 90-148; 81 STAT. 485 (1967).]

FINDINGS AND PURPOSES

“SEC. 101. (a) The Congress finds—

• • • •

“(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

• • • •

“(b) The purposes of this title are—

“(1) to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population;

• • • •

APPENDIX G

The following parties to the consolidated proceedings in the court below are not, insofar as petitioners can determine, adverse to the positions taken in this petition, but are Rule 21(4) respondents:

BUCKEYE POWER, INC.
OHIO VALLEY ELECTRIC CORPORATION
INDIANA-KENTUCKY ELECTRIC CORPORATION
INDIANA & MICHIGAN ELECTRIC CORPORATION
INDIANA STATEWIDE RURAL ELECTRIC COOPERATIVE, INC.
INDIANAPOLIS POWER AND LIGHT COMPANY
NORTHERN INDIANA PUBLIC SERVICE COMPANY
PUBLIC SERVICE COMPANY OF INDIANA, INC.
SOUTHERN INDIANA GAS AND ELECTRIC COMPANY
UTAH INTERNATIONAL, INC.
AMERICAN PETROLEUM INSTITUTE
STANDARD OIL COMPANY
ATLANTIC-RICHFIELD COMPANY
CONTINENTAL OIL COMPANY
EXXON CORPORATION
GULF OIL CORPORATION
MOBIL OIL CORPORATION
SHELL OIL CORPORATION
TEXACO, INC.
UNION OIL COMPANY OF CALIFORNIA
UTAH POWER AND LIGHT COMPANY
PUBLIC SERVICE COMPANY OF COLORADO
COLORADO-UTE ELECTRIC ASSOCIATION

(114a)

115a

PLATT RIVER POWER AUTHORITY
CHEYENNE LIGHT, FUEL AND POWER COMPANY
ALABAMA POWER COMPANY
GEORGIA POWER COMPANY
GULF POWER COMPANY
MISSISSIPPI POWER COMPANY
WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES
ARIZONA PUBLIC SERVICE COMPANY
ARIZONA POWER COOPERATIVE, INC.
NEVADA POWER COMPANY
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND
POWER DISTRICT
SAN DIEGO GAS & ELECTRIC COMPANY
SOUTHERN CALIFORNIA EDISON COMPANY
TUCSON GAS & ELECTRIC COMPANY
EDISON ELECTRIC INSTITUTE
KENTUCKY UTILITIES COMPANY

FEB 17 1977

Nos. 76-529, 76-585, 76-594, 76-603, 76-617, 76-619, 76-620

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

MONTANA POWER COMPANY, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.

AMERICAN PETROLEUM INSTITUTE, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.*

ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

DANIEL M. FRIEDMAN,
*Acting Solicitor General,*PETER R. TAFT,
*Assistant Attorney General,*EDMUND B. CLARK,
EARL SALO,
Attorneys,
Department of Justice,
*Washington, D.C. 20530.*G. WILLIAM FRICK,
General Counsel,
Environmental Protection Agency,
Washington, D.C. 20460.

*Additional captions are shown on reverse side.

INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.

ALABAMA POWER COMPANY, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.

SIERRA CLUB, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.

UTAH POWER AND LIGHT COMPANY, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.

WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES,
ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-529

MONTANA POWER COMPANY, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.

No. 76-585

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO
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THE DISTRICT OF COLUMBIA CIRCUIT*

MEMORANDUM FOR THE FEDERAL RESPONDENTS

OPINION BELOW

The opinion of the court of appeals (Pet. No. 76-529, App. A, pp. 1a-51a) is reported at 540 F. 2d 1114.

JURISDICTION

The judgment of the court of appeals (Pet. No. 76-529, App. C, pp. 91a-94a) was entered on August 2, 1976. The petitions for a writ of certiorari were filed on October 15, 1976 (No. 76-529), October 27, 1976 (No. 76-585), October 29, 1976 (No. 76-594 and No. 76-603), and November 1, 1976 (No. 76-617, No. 76-619, and No. 76-620). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether regulations promulgated by the Environmental Protection Agency to prevent the significant

deterioration of air quality are authorized by the Clean Air Act.

2. Whether the Environmental Protection Agency properly exercised its discretion and complied with the Clean Air Act in promulgating the regulations.

3. Whether a congressional grant of authority to the Environmental Protection Agency to promulgate the regulations is a constitutional delegation of authority and is consistent with the Fifth and Tenth Amendments.

**CONSTITUTIONAL PROVISION, STATUTE
AND REGULATIONS INVOLVED**

The Fifth and Tenth Amendments to the Constitution of the United States are set forth in Pet. App. D,¹ pp. 95a-96a.

The Clean Air Act Amendments of 1970, 84 Stat. 1676, *et seq.*, 42 U.S.C. 1857a, *et seq.*, are set forth in pertinent part in Pet. App. E, pp. 97a-112a.

The relevant regulations, 40 C.F.R. 52.01(d) and (f), and 52.21, are set forth in Pet. App. B, pp. 75a-90a.

STATEMENT

Pursuant to the Clean Air Act Amendments of 1970, 84 Stat. 1676, the Administrator of the Environmental Protection Agency established national primary and secondary standards for ambient air quality and the States submitted plans to EPA designed to implement and maintain these standards within their respective boundaries, as required by Section 110(a)(1) of the Act, 42 U.S.C. 1857c-5(a)(1). If the state implementation plans failed to meet the standards of the Act, or if the State did not submit a plan, the EPA Administrator was required to issue a substitute plan for the State. Section 110(c), 42 U.S.C. 1857c-5(c).

¹Unless otherwise noted, "Pet. App." refers to the Appendix to the Petition in No. 76-529.

On May 30, 1972, one day before the EPA Administrator was to approve or disapprove the various state plans submitted to him, the district court in *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D. D.C.),² issued a preliminary injunction. This prohibited the Administrator from approving any state plan without making it subject to later review by him "to insure that it does not permit significant deterioration of existing air quality in any portion of any state where the existing air quality is better than one or more of the secondary standards promulgated by the Administrator" (Pet. App. A, p. 8a). The court further ordered the Administrator to complete this review within four months.

Upon the Administrator's appeal,³ the court of appeals affirmed on November 1, 1972, relying on the opinion of the district court (Pet. App. A, p. 9a). The court of appeals, which issued no opinion, later denied a stay pending the EPA Administrator's filing of a petition for a writ of certiorari.

In compliance with the district court's order the EPA Administrator, on November 9, 1972, disapproved all state plans "insofar as they failed to provide for the prevention of significant deterioration of existing air quality" (Pet. App. B, p. 53a).

After granting the EPA Administrator's petition for a writ of certiorari and hearing oral argument, this Court affirmed the judgment below on June 11, 1973,⁴ by an

²The district court's opinion was filed on June 2, 1972.

³The parties had stipulated that the district court's preliminary injunction should be regarded as a final order since nothing further remained for trial and since the district court had, in effect, decided the controlling legal question. See *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 n.*.

⁴Twenty States, appearing as *amici curiae*, urged affirmance; two States as *amici* urged reversal.

equally divided Court.⁵ *Fri v. Sierra Club*, 412 U.S. 541. The EPA Administrator therefore became bound to comply with the district court's preliminary injunction, which appeared to have the effect of a final order in the case.⁶

Accordingly, on July 16, 1973, the Administrator published a notice of proposed rulemaking, setting forth possible programs for preventing significant deterioration that could be included in the state implementation plans (Pet. App. B, p. 54a). "A series of public hearings were held and over 300 written comments were submitted in response to this proposal" (*ibid.*).

This is the background against which the regulations at issue here⁷ were promulgated. The regulations limit the deterioration of ambient air quality with respect to two pollutants: particulate matter and sulfur dioxide (SO₂). Under the regulations, areas where air quality is better than the levels set by the national ambient air quality standards are designated class I, class II, or class III areas. The designation determines how much deterioration is "significant," that is, how much deterioration will be allowed in that area. Class I is the most restrictive designation: it allows only slight increases in ambient levels of particulates and SO₂. 40 C.F.R. 52.21 (c)(2)(i). Class II allows more deterioration. *Ibid.* Class III allows deterioration to the level of the national ambient air quality standards. 40 C.F.R. 52.21(c)(2)(ii). All areas are initially designated class II. 40 C.F.R. 52.21(c)(3)(i).

Generally, authority to redesignate areas as either class I or class III is left with the States. 40 C.F.R. 52.21 (c)(3)(ii). As to federal lands, however, the authority is concurrent:

⁵Mr. Justice Powell took no part in the decision of the case.

⁶See note 3, *supra*.

⁷40 C.F.R. 52.01(d) and (f) and 52.21.

the State may redesignate federal lands, but the federal land manager may also redesignate the land to a more restrictive class than would otherwise apply. 40 C.F.R. 52.21(c)(3)(iii), (iv). The regulations do not attempt to change the existing division of authority between the States and Indian tribes. Therefore, when a State has not assumed jurisdiction over an Indian reservation, the Indian governing body has the authority to redesignate the reservation. 40 C.F.R. 52.21(c)(3)(v). Every redesignation must be based on a public hearing and a record demonstrating that anticipated growth in the area has been considered and that social, environmental and economic effects of the proposed redesignation, and regional and national considerations have been taken into account. 40 C.F.R. 52.21(c)(3)(ii), (iv)(a), (v)(a). EPA will not approve a redesignation that arbitrarily and capriciously disregards those considerations. 40 C.F.R. 52.21(c)(3)(vi). Neither will EPA approve a state redesignation unless the State has accepted the responsibility to review new sources of pollution in order to determine whether they will exceed the amount of deterioration allowed under the regulations. 40 C.F.R. 52.21(c)(3)(vi)(a). (This requirement may be waived if the State lacks legal authority to accept responsibility for such new source review. 40 C.F.R. 52.21(c)(3)(vi)(f).)

A procedure for "review of new sources," 40 C.F.R. 52.21(d), insures that the deterioration limits are not violated. Under this procedure construction or modification of nineteen enumerated stationary sources of particulates or SO₂ may not be commenced unless EPA determines that the new or modified source will not, in conjunction with emissions from other sources in the area, violate the air quality increments. 40 C.F.R. 52.21(d)(2)(i). In addition, the source must use the best available pollution control technology for particulates and sulfur dioxide, which in most cases is the same as the technology already required by EPA's new source standards under Section 111 of the Act,

42 U.S.C. 1857c-6. 40 C.F.R. 52.01(f), 52.21(d)(2)(ii). The authority to review new sources may be delegated to the States under 40 C.F.R. 52.21(f).

Petitions to review the significant deterioration regulations that had been filed in several courts of appeals were transferred to the Court of Appeals for the District of Columbia Circuit. See *Dayton Power and Light Co. v. Environmental Protection Agency*, 520 F. 2d 703 (C.A. 6). The court of appeals, after reconsidering its decision in *Sierra Club v. Ruckelhaus*, *supra*, held that the Clean Air Act authorized significant deterioration regulations. In the court's view, "[i]t would fly in the face of overwhelming evidence of legislative intent to hold that the Clean Air Act does not contain a requirement of prevention of significant deterioration" (Pet. App. A, p. 23a).

As to the validity of the particular regulations, the industry petitioners argued that EPA had exceeded its statutory authority and abused its discretion because the regulations allegedly were unrelated to the effects of adverse air quality, were unworkable and interfered with authority granted to the States under the Act. The court rejected these arguments and rejected as well petitioners' further contentions that the regulations were unconstitutional because they had no rational relationship to the protection of public health, took private property without just compensation and represented an unconstitutionally vague delegation of authority to EPA (Pet. App. A, pp. 34a-44a, 48a-50a). The court further held that the question regarding the authority of federal land managers and Indian governing bodies to propose redesignation of their lands (see p. 6-7, *supra*) was not ripe for review (Pet. App. A, pp. 45a-48a). As to the contentions of the petitioners representing environmental groups and individuals, the court held that the regulations were not invalid on the basis that air quality in regions designated class III would deteriorate or on the basis that only two of the six primary air pollutants are covered (Pet. App. A, pp. 29a-34a).

After the decision of the court of appeals in this case, the House and the Senate passed different versions of proposed Clean Air Act Amendments of 1976.⁸ Both the House and the Senate bills included provisions designed to implement a policy to prevent significant deterioration of air quality, as did the bill that emerged from the Conference Committee.⁹ However, Congress adjourned without voting on the conference proposal.

On January 14, 1977, Senator Muskie introduced two bills to amend the Clean Air Act, one of which is the same as the bill passed by the Senate in 1976; each contains requirements specifying how significant deterioration of air quality is to be prevented.¹⁰ Hearings on these bills before the Subcommittee on Environmental Pollution of the Senate Committee on Public Works are now underway.¹¹

DISCUSSION

As noted above (p. 4, *supra*), four years ago this Court granted the EPA Administrator's certiorari petition presenting the question whether, under the Clean Air Act, state implementation plans must contain provisions to prevent significant deterioration of air quality. Five

⁸S. 3219, 94th Cong., 2d Sess. (1976), 122 Cong. Rec. S13543-S13544 (daily ed., August 5, 1976); H.R. 10498, 94th Cong., 2d Sess. (1976), 122 Cong. Rec. H10198-H10201 (daily ed., September 16, 1976).

⁹H.R. Rep. No. 94-1742, 94th Cong., 2d Sess. (1976); see 122 Cong. Rec. H11959, H11970-H11973, H11987-H11988 (daily ed., September 30, 1976).

¹⁰S. 252 and S. 253, 95th Cong., 1st Sess. (1977), 123 Cong. Rec. S646-S647 (daily ed., January 14, 1977).

¹¹Senator Muskie stated that the Senate Committee on Public Works could be expected to report a bill before March 15, 1977 (123 Cong. Rec. S647 (daily ed., January 14, 1977)).

of the petitions in this case raise the same issue.¹² The issue was important in 1972 and it is no less important today. Accordingly, we do not oppose the petitions insofar as they present this issue.

The other issues raised in the seven petitions in this case relate generally to the questions whether the regulations are arbitrary and capricious, whether the regulations were promulgated in accordance with the procedures required by the Act, and whether the regulations violate the Constitution (see p. 7, *supra*). We likewise do not oppose the petitions raising these issues. It is difficult to divorce the question whether the Act authorizes the particular regulations involved here from the broader question whether the Act authorizes any significant deterioration regulations. Indeed, the first question presented in five of the petitions¹³ may fairly comprehend the subsidiary issues concerning whether the current EPA regulations conform to the standards of the Act. Many of the arguments of the industry petitioners that the regulations are arbitrary or procedurally defective or violate the Constitution overlap with their arguments that Congress did not intend to authorize any significant deterioration regulations.¹⁴

In order for the Court to receive a full and complete presentation of the competing contentions in this case, we therefore do not oppose the petitions insofar as they raise issues collateral to the primary question of the EPA

¹²Pet. No. 76-529, at p. 2 (Question 1); Pet. No. 76-585, at p. 2 (Question 1); Pet. No. 76-594, at p. 2 (Question 1); Pet. No. 76-603, at p. 2 (Question 1); Pet. No. 76-619, at p. 2 (Question 1). See also Pet. No. 76-620, at p. 3 n. 3, concurring in the questions presented in Pet. No. 76-529.

¹³See note 12, *supra*.

¹⁴Compare Pet. No. 76-620, at pp. 6-18, with Pet. No. 76-529, at pp. 30-37, and Pet. No. 76-585, at pp. 12-26.

Administrator's responsibility with respect to state implementation plans that do not contain significant deterioration provisions.

CONCLUSION

The federal respondents do not oppose the granting of the petitions for a writ of certiorari.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

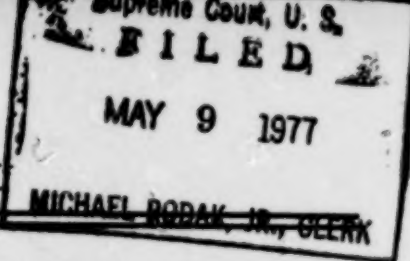
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Environmental Protection Agency.

FEBRUARY 1977.

APPENDIX



In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-529

MONTANA POWER COMPANY, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-585

AMERICAN PETROLEUM INSTITUTE, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-594

INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-603

ALABAMA POWER COMPANY, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-619

UTAH POWER & LIGHT COMPANY, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-620

WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED
ON OCTOBER 15 (NO. 76-529), 27 (NO. 76-585), 29 (NOS. 76-594,
76-603), AND NOVEMBER 1, 1976 (NOS. 76-619, 76-620)

CERTIORARI GRANTED APRIL 4, 1977

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-529

MONTANA POWER COMPANY, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-585

AMERICAN PETROLEUM INSTITUTE, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-594

INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-603

ALABAMA POWER COMPANY, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-619

UTAH POWER & LIGHT COMPANY, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-620

WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES,
ET AL., *Petitioners*,

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**Composite of Relevant Docket Entries Entered in Various
United States Courts of Appeals in Which Petitions Below
Were Considered ***

DATE

1974

Nov. 27 [Sixth Circuit]**—Joint Petition to review an order of the United States Environmental Protection Agency ("EPA") filed in the Sixth Circuit, No. 74-2297, by Petitioners: The Dayton Power and Light Company; Kentucky Power Company; Kentucky Utilities Company; Ohio Edison Company; and Ohio Power Company.

Nov. 27—Petition to review an order of the EPA filed in the District of Columbia Circuit, No. 74-2063, by Petitioner, the Sierra Club; c/m 11/27/74.

Dec. 5—Petition to review an order of the EPA filed in the District of Columbia Circuit, No. 74-2079, by Petitioner, the Sierra Club; c/m 12/5/74.

Dec. 20 [Tenth Circuit]—Joint Petition to review an order of the EPA filed in the Tenth Circuit, No. 74-1866, by Petitioners: Public Service Company of Colorado; Colorado-Ute Electric Association, Inc.; Platte River Power Authority; Cheyenne Light, Fuel,

* Petitions to review the Environmental Protection Agency's "significant deterioration" regulations (40 C.F.R. §§ 52.01 (d), (f), and 52.21 (1976)) were filed in the United States Courts of Appeals for the Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits. All petitions filed in Circuits other than the District of Columbia Circuit were eventually transferred to that Circuit, where they were consolidated for review.

** Bracketed information denotes the United States Court of Appeals in which the docket entry was made if other than the United States Court of Appeals for the District of Columbia Circuit.

and Power Company; and Pacific Power & Light Company.

Dec. 23 [Tenth Circuit]—Petition to review an order of the EPA filed in the Tenth Circuit, No. 74-1869, by Petitioner, Utah Power & Light Company.

Dec. 26 [Ninth Circuit]—Joint petition to review an order of the EPA filed in the Ninth Circuit, No. 74-3460, by Petitioners: Montana Power Company; Pacific Power & Light Company; Portland General Electric Company; Puget Sound Power & Light Company; and Washington Water Power Company. [This joint petition to review was transferred on April 1, 1975 by the Ninth Circuit to the Sixth Circuit and refiled on April 15, 1975 in the Sixth Circuit, No. 75-1398.]

Dec. 27 [Seventh Circuit]—Petition to review an order of the EPA filed in the Seventh Circuit, No. 74-2055, by Petitioners: Indiana-Kentucky Electric Corporation; Indiana & Michigan Electric Company; Indiana Statewide Rural Electric Cooperative, Inc.; Indianapolis Power & Light Company; Northern Indiana Public Service Company; Public Service Company of Indiana, Inc.; and Southern Indiana Gas and Electric Company.

Dec. 27 [Sixth Circuit]—Petition to review an order of the EPA filed in the Sixth Circuit, No. 74-2358, by Petitioners: Buckeye Power, Inc.; The Cincinnati Gas & Electric Company; The Cleveland Electric Illuminating Company; Columbus and Southern Ohio Electric Company; and Ohio Valley Electric Corporation.

Dec. 27 [Fifth Circuit]—Joint petition to review an order of the EPA filed in the Fifth Circuit, No. 74-4234, by Petitioners: Alabama Power Company; Georgia Power Company; Gulf Power Company; and Mississippi Power Company. [This joint petition to review was transferred on January 15, 1975 by the Fifth Circuit

to the Sixth Circuit and refiled on January 31, 1975 in the Sixth Circuit, No. 75-1118.]

Dec. 30 [Ninth Circuit]—Joint petition to review an order of the EPA filed in the Ninth Circuit, No. 74-3501, by Petitioners: Salt River Project Agricultural Improvement and Power District; Arizona Public Service Company; Tucson Gas & Electric Company; Nevada Power Co.; Pacific Power & Light Company; Arizona Electric Power Co-Op, Inc.; San Diego Gas & Electric Co.; and Southern California Edison Company. [This joint petition to review was transferred on April 1, 1975 by the Ninth Circuit to the Sixth Circuit and refiled on April 15, 1975 in the Sixth Circuit, No. 75-1398.]

Dec. 30—Order per Chief Judge Bazelon in the District of Columbia Circuit, Nos. 74-2063 and 74-2079, granting Petitioners' motion to consolidate petitions for review and Nos. 74-2063 and 74-2079 are consolidated for consideration on the merits.

1975

Jan. 2 [Sixth Circuit]—Petition to review an order of the EPA filed in the Sixth Circuit, No. 75-1001, by Petitioners: American Petroleum Institute; The Standard Oil Company (Ohio); Atlantic Richfield Company; Continental Oil Company; Exxon Corporation; Gulf Oil Corporation; Mobil Oil Corporation; Shell Oil Company; Texaco Inc.; and Union Oil Company of California.

Jan. 3 [Tenth Circuit]—Petition to review an order of the EPA filed in the Tenth Circuit, No. 75-1006, by Petitioners: Pacific Coal Gasification Company and Transwestern Coal Gasification Company.

Jan. 6 [Tenth Circuit]—Petition to review an order of the EPA filed in the Tenth Circuit, No. 75-1007, by Petitioner, Utah International Inc.

Jan. 7—Order of the Clerk of the District of Columbia Circuit, in No. 74-2063, that Western Energy Supply and Transmission Asso., Arizona Public Service Co., The Dayton Power and Light Co., Kentucky Power Co., Kentucky Utilities Co., Ohio Edison Co., Ohio Power Co., Utah Power & Light Co., and Edison Electric Institute are granted leave to intervene.

Jan. 31 [Sixth Circuit]—Joint petition to review an order of the EPA filed by Petitioners: Alabama Power Company; Georgia Power Company; Gulf Power Company; and Mississippi Power Company; refiled in the Sixth Circuit, No. 75-1118. [This joint petition to review was initially filed on December 27, 1974 in the Fifth Circuit, No. 74-4234; transferred on January 15, 1975 by the Fifth Circuit to the Sixth Circuit; and refiled on January 31, 1975 in the Sixth Circuit, No. 75-1118.]

Feb. 18—Certified Index to the record filed in the District of Columbia Circuit, Nos. 74-2063 and 74-2079.

Mar. 24 [Ninth Circuit]—Order entered in the Ninth Circuit to transfer Case Nos. 74-3447, 74-3460 and 74-3501 in the Ninth Circuit to the Sixth Circuit.

Mar. 31 [Tenth Circuit]—Order entered in the Tenth Circuit to transfer Case Nos. 74-1866, 74-1869, 74-1871, 75-1006 and 75-1007 in the Tenth Circuit to the District of Columbia Circuit.

Apr. 1 [Ninth Circuit]—Records of Ninth Circuit Case Nos. 74-3447, 74-3460 and 74-3501 transferred from the Ninth Circuit to the Clerk for the Sixth Circuit.

Apr. 2—Case Nos. 74-1866, 74-1869, 74-1871, 75-1006 and 75-1007 in the Tenth Circuit transferred to the District of Columbia Circuit and entered as Nos. 75-1368, 75-1369, 75-1370, 75-1371 and 75-1372 in the District

of Columbia Circuit. *See* Tenth Circuit order to transfer entered March 31, 1975.

Apr. 15 [Sixth Circuit]—Joint petition to review an order of the EPA filed by Petitioners: Montana Power Company; Pacific Power & Light Company; Portland General Electric Company; Puget Sound Power & Light Company; and Washington Water Power Company; refiled in the Sixth Circuit, No. 75-1398. [This joint petition to review was initially filed on December 26, 1974 in the Ninth Circuit, No. 74-3460; transferred on April 1, 1975 by the Ninth Circuit to the Sixth Circuit; and refiled on April 15, 1975 in the Sixth Circuit, No. 75-1398.]

Apr. 15 [Sixth Circuit]—Joint petition to review an order of the EPA filed by Petitioners: Salt River Project Agricultural Improvement and Power District; Arizona Public Service Company; Tucson Gas & Electric Company; Nevada Power Co.; Pacific Power & Light Company; Arizona Electric Power Co-Op, Inc.; San Diego Gas Electric Co.; and Southern California Edison Company; refiled in the Sixth Circuit, No. 75-1398. [This joint petition to review was initially filed on December 30, 1974 in the Ninth Circuit, No. 74-3501; transferred on April 1, 1975 by the Ninth Circuit to the Sixth Circuit; and refiled on April 15, 1975 in the Sixth Circuit, No. 75-1398.]

Apr. 15 [Sixth Circuit]—Case Nos. 74-3447, 74-3460 and 74-3501 in the Ninth Circuit transferred to the Sixth Circuit and entered as No. 75-1398 in the Sixth Circuit. *See* Ninth Circuit order to transfer entered March 24, 1975.

May 21 [Seventh Circuit]—Order entered in the Seventh Circuit to transfer Case No. 74-2055 in the Seventh Circuit to the District of Columbia Circuit.

June 10—Case No. 74-2055 in the Seventh Circuit transferred to the District of Columbia Circuit and entered as No. 75-1575 in the District of Columbia Circuit. *See* Seventh Circuit order to transfer entered May 21, 1975.

June 16 [Sixth Circuit]—Judgment entered in the Sixth Circuit to transfer Case Nos. 74-2297; 74-2358; 75-1001; 75-1118; and 75-1398 in the Sixth Circuit to the District of Columbia Circuit.

July 14—Case Nos. 74-2297; 74-2358; 75-1001; and 75-1118 in the Sixth Circuit transferred to the District of Columbia Circuit and entered as Case Nos. 75-1663; 75-1664; 75-1665; and 75-1666 in the District of Columbia Circuit. *See* Sixth Circuit Judgment entered June 16, 1975.

Aug. 6—Case No. 75-1398 in the Sixth Circuit transferred to the District of Columbia Circuit and entered as Case Nos. 75-1763 and 75-1764 in the District of Columbia Circuit. *See* Sixth Circuit Judgment entered June 16, 1975.

August 6—Clerk's order in Nos. 75-1763 and 75-1764 that the petitions for review filed by the following parties shall be assigned the following docket numbers in this court: *Kennecott Copper Corporation v. EPA*, No. 75-1668; *Montana Power Company, et al. v. U.S. Environmental Protection Agency*, No. 75-1763; and *Salt River Project Agricultural Improvement and Power District, et al. v. EPA and Russell E. Train, Administrator*, No. 75-1764.

August 8—Clerk's order granting motion for leave to intervene by The Sierra Club; the Metropolitan Washington Coalition for Clean Air; the New Mexico Citizens for Clean Air and Water; and Sally Rodgers. Counsel for the intervenors may participate in oral argument only to the extent allowable under Rule 12

of the General Rules of this Court. (Nos. 75-1368; 75-1369; 75-1370; 75-1371; 75-1372; 75-1763 and 75-1764.)

August 8—Clerk's order in Nos. 75-1763 and 75-1764 granting motion of The State of Nevada for leave to intervene in the consolidated cases. Counsel for the intervenor may participate in oral argument only to the extent allowable under Rule 12 of the General Rules of this Court. [Order vacated per Clerk's order of 12/3/75 in Nos. 75-1763 and 75-1764.]

August 8—Order per Chief Judge Bazelon granting motion of Sierra Club, *et al.* and the State of New Mexico for consolidation and Nos. 74-2063, 74-2079, 75-1368, 75-1369, 75-1370, 75-1371, 75-1372, 75-1575, 75-1663, 75-1664, 75-1665, 75-1666, 75-1667, 75-1763 and 75-1764 are hereby consolidated for consideration on the merits.

August 8—Order per Chief Judge Bazelon that the certified index to record filed in Nos. 74-2063 and 74-2079 shall be deemed filed in all of the consolidated cases.

August 8—Certified index to record (filed in Nos. 74-2063 and 74-2079 on 2-18-75).

Nov. 24—Motion of Intervenor, the State of Nevada, in Nos. 75-1763 and 75-1764 to vacate order granting intervention.

Nov. 26—Joint Appendix, Vols. I & II; c/m 11/26/75.

Dec. 3—Clerk's order in Nos. 75-1763 and 75-1764 granting motion of Intervenor, the State of Nevada, to vacate order granting intervention and the order filed August 8, 1975 in the consolidated cases granting the motion of the State of Nevada for leave to intervene be, and the same hereby is, vacated; the Clerk is directed to make an appropriate notation on the records of his office to reflect the vacation of the aforesaid intervention.

Dec. 17—Per Curiam order en banc that Petitioners' suggestion for appropriateness of initial hearing en banc is denied; Chief Judge Bazelon; Wright, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges.

1976

Feb. 25—Order per Chief Judge Bazelon that the motion for expedited hearing of these consolidated cases is granted. (Nos. 74-2063 and 74-2079 only).

June 9—Argued before Circuit Judges Wright, Robinson and Wilkey.

August 2—Opinion for the Court filed by Circuit Judge Wright.

August 2—Judgment affirming order of the EPA (N).

August 24—Certified copy of the opinion and judgment issued to the EPA.

Oct. 20—Notice from Clerk, Supreme Court that petition for certiorari was filed in S.C.No. 76-529 on Oct. 15, 1976. (Filed in No. 75-1763).

Oct. 29—Notice of filing of a petition for writ of certiorari in S.C. No. 76-585 on October 27, 1976. (Filed in No. 75-1665).

Nov. 2—Notice from Clerk, Supreme Court that petition for certiorari was filed in S.C. No. 76-594 on Oct. 29, 1976. (Filed in No. 75-1575).

Nov. 3—Notice of filing of petition for writ of certiorari in S.C. No. 76-603 on October 29, 1976. (Filed in No. 75-1666).

Nov. 3—Notice of filing of petition for writ of certiorari in S.C. No. 76-617 on November 1, 1976. (Filed in Nos. 74-2063 and 74-2079).

Nov. 3—Notice of filing of petition for writ of certiorari in S.C. No. 76-619 on November 1, 1976. (Filed in Nos. 75-1368 and 75-1369).

Nov. 3—Notice of filing of petition for writ of certiorari in S.C. No. 76-620 on November 1, 1976. (Filed in Nos. 75-1372 and 75-1764).

1977

April 11—Certified copy of order from Clerk, Supreme Court, granting writ of certiorari limited to certain questions in S.C. No. 76-529 on April 4, 1977. (See order for questions). (Filed in No. 75-1763).

April 11—Certified copy of order from Clerk, Supreme Court, granting writ of certiorari limited to certain questions in S.C. No. 76-585 on April 4, 1977. (See order for questions). (Filed in No. 75-1665).

April 11—Certified copy of order from Clerk, Supreme Court, granting writ of certiorari limited to certain questions in S.C. No. 76-594 on April 4, 1977. (See order for questions). (Filed in No. 75-1575).

April 11—Certified copy of order from Clerk, Supreme Court, granting writ of certiorari limited to certain questions in S.C. No. 76-603 on April 4, 1977. (See order for questions). (Filed in No. 75-1666).

April 11—Certified copy of order from Clerk, Supreme Court, denying writ of certiorari in S.C. No. 76-617 on April 4, 1977. (This was Sierra Club's petition; filed in Nos. 74-2063 and 74-2079).

April 11—Certified copy of order from Clerk, Supreme Court, granting writ of certiorari limited to certain questions in S.C. No. 76-619 on April 4, 1977. (See order for questions.) (Filed in Nos. 75-1368 and 75-1369).

April 11—Certified copy of order from Clerk, Supreme Court, granting writ of certiorari limited to certain questions in S.C. No. 76-620 on April 4, 1977. (This was Western Energy Supply and Transmission Associates, *et al.*, petition; filed in No. 74-2063).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-2297

[Filed November 27, 1974]

THE DAYTON POWER AND LIGHT COMPANY,
KENTUCKY POWER COMPANY,
KENTUCKY UTILITIES COMPANY,
OHIO EDISON COMPANY,
OHIO POWER COMPANY,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Joint Petition for Review

Pursuant to 42 U.S.C. § 1857h-5(b)(1) (1970) and Rule 15, Federal Rules of Appellate Procedure for the United States Court of Appeals, Petitioners, the Dayton Power and Light Company, Kentucky Power Company, Kentucky Utilities Company, Ohio Edison Company, and Ohio Power Company, petition the Court for review of the regulation promulgated by Respondent, the United States Environmental Protection Agency, on November 27, 1974, amending Subpart A, Section 52.21 of the regulations of the United States Environmental Protection Agency relating to approvals and promulgations of State implementation plans under the Clean Air Act.

12a

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[Certificate of Service omitted in printing]

13a

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 74-1866

[Filed December 20, 1974]

PUBLIC SERVICE COMPANY OF COLORADO, a Colorado corporation, COLORADO-UTE ELECTRIC ASSOCIATION, INC., a Colorado corporation, PLATTE RIVER POWER AUTHORITY, a Colorado nonprofit corporation, CHEYENNE LIGHT, FUEL AND POWER COMPANY, a Wyoming corporation, and PACIFIC POWER & LIGHT COMPANY, a Maine corporation, *Petitioners*,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Joint Petition for Review

Pursuant to 42 USC § 1857h-5(b) and Rule 15 of the Federal Rules of Appellate Procedure for the United States Court of Appeals, the above named petitioners hereby petition this Court for review of the regulation of the United States Environmental Protection Agency published in the Federal Register December 5, 1974, Volume 39, pages 42510-42517, amending Subpart A, Section 52.21 of the regulations of the United States Environmental Protection Agency relating to approvals and promulgation of state implementation plans under the Clean Air Act, as amended. Said regulations are attached hereto and incorporated herein as Exhibit A. [Exhibit A omitted in printing.]

Petitioners, Public Service Company of Colorado and Colorado-Ute Electric Association, Inc., are public utilities operating in the State of Colorado; Platte River Power Authority is a Colorado nonprofit corporation being wholly

owned and an instrumentality of the municipalities of Estes Park, Longmont, Loveland and Fort Collins, Colorado; Cheyenne Light, Fuel and Power Company and Pacific Power and Light Company are public utilities operating in the State of Wyoming. All of said utilities are directly affected by said regulations.

Dated this 20th day of December, 1974.

Respectfully submitted,

LEE, BRYANS, KELLY & STANSFIELD

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Cheyenne Light, Fuel and Power Company
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Pacific Power & Light Company
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Portland, Oregon 97204

[Certificate of Service and Exhibit A omitted in printing]

16a

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 74-1869

[Filed December 23, 1974]

UTAH POWER & LIGHT COMPANY,
Petitioner,

vs.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review

Utah Power & Light Company hereby petitions the Court for review of the Order of the Environmental Protection Agency entitled "Part 52—Approval and Promulgation of Implementation Plans, Prevention of Significant Air Quality Deterioration," published at 39 Federal Register 42510 *et seq.* on December 5, 1974.

Respectfully submitted,

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PRATHER LEVENBERG SEEGER
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[Certificate of Service omitted in printing]

17a

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-3460

[Filed December 26, 1974]

MONTANA POWER COMPANY,
PACIFIC POWER & LIGHT COMPANY,
PORTLAND GENERAL ELECTRIC COMPANY,
PUGET SOUND POWER & LIGHT COMPANY, and
WASHINGTON WATER POWER COMPANY,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Joint Petition for Review

Pursuant to Section 307(b)(1) of the Clean Air Act, as amended, 84 Stat. 1708, 42 U.S.C. § 1857h-5(b)(1), and Rule 15, Federal Rules of Appellate Procedure, petitioners, Montana Power Company, Pacific Power & Light Company, Portland General Electric Company, Puget Sound Power & Light Company, and Washington Water Power Company, hereby petition the Court for review of the regulations promulgated by the respondent, United States Environmental Protection Agency, on November 27, 1974, amending 40 C.F.R. §§ 52.01 and 52.21, and published in 39 Fed. Reg. 42514-42517 (December 5, 1974). These regulations, of which review is sought, relate to the approvals and promulgations of state implementation plans under the Clean Air Act, as amended, with specific reference to the significant deterioration of air quality.

18a

FRANCIS M. SHEA
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December 26, 1974

[Certificate of Service omitted in printing]

19a

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 74-2055

[Filed December 27, 1974]

INDIANA-KENTUCKY ELECTRIC CORPORATION,
INDIANA & MICHIGAN ELECTRIC COMPANY,
INDIANA STATEWIDE RURAL ELECTRIC COOPERATIVE, INC.,
INDIANAPOLIS POWER & LIGHT COMPANY,
NORTHERN INDIANA PUBLIC SERVICE COMPANY,
PUBLIC SERVICE COMPANY OF INDIANA, INC., and
SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review

Indiana-Kentucky Electric Corporation, which generates electric power primary for the Portsmouth, Ohio facility of the United States Atomic Energy Commission, Indiana & Michigan Electric Company, which generates electric power for the residents of Indiana and Michigan, Indiana Statewide Rural Electric Corporation, Inc., which generates electric power for residents of Indiana, Indianapolis Power & Light Company, which generates electric power for residents of Indiana, Northern Indiana Public Service Company, which generates electric power for residents of Indiana, Public Service Company of Indiana, Inc., which generates electric power for residents of Indiana and Southern Indiana Gas and Electric Company, which generates electric power for residents of Indiana hereby petition the Court for review of the Order of the United States Environmental Protection Agency entitled "Air

Quality Implementation Plans, Prevention of Significant Air Quality Deterioration" published in the Federal Register on Thursday, December 5, 1974, at 39 Fed. Reg. 42509-42517, inclusive.

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Of Counsel

[Certificate of Service omitted in printing]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-2358

[Filed December 27, 1974]

BUCKEYE POWER, INC., ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
RUSSELL E. TRAIN, Administrator of the
Environmental Protection Agency,
Respondent.

Petition for Review

Buckeye Power, Inc., The Cincinnati Gas & Electric Company, The Cleveland Electric Illuminating Company and Columbus and Southern Ohio Electric Company, all owning and operating electric generating plants in Ohio for the supply of electric energy to residents of Ohio, and Ohio Valley Electric Corporation, which generates electric power in Ohio primarily for the Portsmouth, Ohio facility of the United States Atomic Energy Commission, all of which above referred plants are subject to the provisions of the Ohio Implementation Plan described below, hereby petition the Court for a review, pursuant to Title 42 United States Code, Section 1857h-5(b) and (c), of the Order of the Environmental Protection Agency, acting through Russell Train, Administrator, dated November 27, 1974, as published in the Federal Register, Volume 39, No. 235 at 42514 et seq., on Thursday, December 5, 1974, titled 40 Code of Federal Regulations, Chapter I, Subchapter A, Part 52, "Approval and Promulgation of Implementation Plans," as said Order relates to the Plan of the State of Ohio entitled "Implementation Plan for the

Control of Suspended Particulates, Sulfur Dioxide, Carbon Monoxide, Hydrocarbons, Nitrogen Dioxide, and Photochemical Oxidants in the State of Ohio," together with all supplements.

/s/ LESLIE HENRY
Leslie Henry

/s/ WILSON W. SNYDER
Wilson W. Snyder

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Of Counsel:

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[Certificate of Service omitted in printing]

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-4234

[Filed December 27, 1974]

ALABAMA POWER COMPANY,
GEORGIA POWER COMPANY,
GULF POWER COMPANY, and
MISSISSIPPI POWER COMPANY,
Petitioners,

v.

RUSSELL E. TRAIN, as Administrator, Environmental
Protection Agency, 401 M Street, S.W.,
Washington, D. C. 20560
Respondent.

Joint Petition for Review

Pursuant to 42 U.S.C. § 1857h-5(b)(1) (1970) and Rule 15, Federal Rules of Appellate Procedure, Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company hereby petition this Court to review the Order of the Administrator of the United States Environmental Protection Agency, issued on November 27, 1974, promulgating regulations relating to approvals of state implementation plans and for the prevention of significant air quality deterioration. These regulations were issued pursuant to the Clean Air Act of 1970, 42 U.S.C. § 1857 *et seq.* and appear at 40 C.F.R. Part 52.

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Respectfully submitted,

/s/ S. EASON BALCH
S. Eason Balch

/s/ ROBERT A. BUETTNER
Robert A. Buettner

/s/ JOHN P. SCOTT, JR.
John P. Scott, Jr.

BALCH, BINGHAM, BAKER, HAWTHORNE,
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Phone: (205) 323-8391

Attorneys for Petitioners

Dated: December 27, 1974

[Certificate of Service omitted in printing]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-3501

[Filed December 30, 1974]

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an Arizona Agricultural Improvement District; ARIZONA PUBLIC SERVICE COMPANY, an Arizona corporation; TUCSON GAS & ELECTRIC COMPANY, an Arizona corporation; NEVADA POWER Co., a Nevada corporation; PACIFIC POWER & LIGHT COMPANY, a Maine corporation, doing business as a public utility corporation in Idaho, California, Oregon, Washington, Montana and Wyoming; ARIZONA ELECTRIC POWER CO-OP, INC., an Arizona corporation; SAN DIEGO GAS & ELECTRIC Co., a California corporation, doing business as a public utility in California; and SOUTHERN CALIFORNIA EDISON COMPANY, a California corporation,

Petitioners,

vs.

ENVIRONMENTAL PROTECTION AGENCY and RUSSELL E. TRAIN,
Administrator, Environmental Protection Agency,
Respondent.

Joint Petition for Review

Pursuant to 42 U.S.C. § 1857h-5(b)(1)(1970) and Rule 15, Federal Rules of Appellate Procedure for the United States Court of Appeals, petitioners seek review of the regulations regarding significant deterioration of air quality which were promulgated by Respondent ENVIRONMENTAL PROTECTION AGENCY on November 27, 1974, and published in the Code of Federal Regulations on December 5, 1974, Vol. 39, No. 235, pgs. 42510, *et seq.*, including review of the regulations promulgated by Respondent

amending Subpart A, Part 52, Chapter I, Title 40 of the Code of Federal Regulations, on the grounds that each of them will be profoundly and adversely affected by said promulgation and that it is the promulgation of an implementation plan subject to review by this Court.

Petitioners are all suppliers of electrical energy to portions of the Southwest United States and include SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an Arizona Agricultural Improvement District; ARIZONA PUBLIC SERVICE COMPANY, an Arizona corporation; TUCSON GAS AND ELECTRIC Co., a corporation; NEVADA POWER Co., a Nevada corporation; PACIFIC POWER & LIGHT COMPANY, a Maine corporation, doing business as a public utility corporation in Idaho, California, Oregon, Utah, Montana and Wyoming; SAN DIEGO GAS & ELECTRIC Co., a California corporation, doing business as a public utility in California; ARIZONA ELECTRIC POWER CO-OP, INC., an Arizona corporation, and SOUTHERN CALIFORNIA EDISON COMPANY, a California corporation.

JENNINGS, STROUSS & SALMON

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SNELL & WILMER

/s/ BRUCE NORTON
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Attorneys for Petitioners

[Certificate of Service omitted in printing]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-1001

[Filed January 2, 1975]

AMERICAN PETROLEUM INSTITUTE,
THE STANDARD OIL COMPANY (OHIO),
ATLANTIC RICHFIELD COMPANY,
CONTINENTAL OIL COMPANY,
EXXON CORPORATION,
GULF OIL CORPORATION,
MOBIL OIL CORPORATION,
SHELL OIL COMPANY,
TEXACO INC., and
UNION OIL COMPANY OF CALIFORNIA,
Petitioners,

vs.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

**Petition for Review of Regulations Promulgated by the
Environmental Protection Agency**

Pursuant to 42 U.S.C. § 1857h-5(b)(1) (1970), American Petroleum Institute, The Standard Oil Company (Ohio), Atlantic Richfield Company, Continental Oil Company, Exxon Corporation, Gulf Oil Corporation, Mobil Oil Corporation, Shell Oil Company, Texaco Inc., and Union Oil Company of California petition this Court for review of the regulations promulgated by the Environmental Protection Agency, amending Subpart A, Sections 52.01 and 52.21 of the regulations of the Environmental Protection Agency relating to the approval and promulgation of State implementation plans under the Clean Air Act, such amending regulations being published in the Federal Register of December 5, 1974 at 39 Fed. Reg. 42510 *et seq.*

Petitioners, except for the American Petroleum Institute of which all other petitioners are members, are petroleum companies either having their principal operating office, refineries or other facilities in Ohio, Michigan, Tennessee or Kentucky.

AMERICAN PETROLEUM INSTITUTE
THE STANDARD OIL COMPANY (OHIO)
ATLANTIC RICHFIELD COMPANY
CONTINENTAL OIL COMPANY
EXXON CORPORATION
GULF OIL CORPORATION
MOBIL OIL CORPORATION
SHELL OIL COMPANY
TEXACO INC.
UNION OIL COMPANY OF CALIFORNIA

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 75-1006

[Filed January 3, 1975]

PACIFIC COAL GASIFICATION COMPANY and
TRANSWESTERN COAL GASIFICATION COMPANY,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review

Pursuant to the provisions of § 1857h-5(b)(1) of the Clean Air Act, 42 U.S.C. § 1857, and § 702 of the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, Pacific Coal Gasification Company and Transwestern Coal Gasification Company hereby petition the court for review of the Order and Regulations of the Environmental Protection Agency entitled "Air Programs, Approval and Promulgation of Implementation Plans, Prevention of Significant Air Quality Deterioration," and published in 39 Federal Register, No. 235, December 5, 1974, at pages 42510 to 42517. Pacific Coal Gasification Company and Transwestern Coal Gasification Company are adversely affected and aggrieved by this action of the Environmental Protection Agency.

JAMES W. MCCARTNEY
NORMAN D. RADFORD, JR.
VINSON, ELKINS, SEARLS, CONNALLY & SMITH
/s/ NORMAN D. RADFORD, JR.
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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 75-1007

[Filed January 6, 1975]

UTAH INTERNATIONAL INC., a corporation,
Petitioner,

vs.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review

Utah International Inc., a corporation, hereby petitions the Court for review of the order and regulations promulgated by the Environmental Protection Agency, acting by and through its Administrator, dated November 27, 1974 and effective January 6, 1975 and entitled "Approval and Promulgation of Implementation Plans-Prevention of Significant Air Quality Deterioration", published in 39 Fed. Reg. No. 235, December 5, 1974, at pages 42510 et seq., insofar as such order and regulations apply to the State of New Mexico implementation plan and lands lying within the exterior boundaries of the State of New Mexico.

Utah International Inc., the petitioner, is lessee under a coal mining lease from the Navajo Tribe of Indians, holding a valuable coal reserve on the Navajo Reservation within the exterior boundaries of the State of New Mexico. The coal reserve is committed by contracts for the fuel supply for the adjacent Four Corners Powerplant and as the basis for the future establishment of a coal gasification complex to be constructed adjacent to the leasehold. Petitioner also has contractual obligations for it to mine coal for Western Coal Company for the fuel supply for existing and future units of the San Juan Generating Station.

Said existing and prospective sources are located within the State of New Mexico and have and would have emissions affecting the air quality and deterioration increments which are the subject of respondent's order and regulations sought to be reviewed; and certain of the future units at the gasification complex and at the San Juan Generating Station would, under the regulations sought to be reviewed, be subject to new source review and emission limitation as a condition precedent to construction. The denial of permission to construct new units at the gasification complex or at the San Juan Generating Station will immediately harm Utah International Inc.'s coal sales and revenues from mining operations and to the extent that said order and regulations may force any curtailment of production at the existing or future sources, said order and regulations would affect adversely the levels of petitioner's coal sales and mining operations. Petitioner has a personal stake and interest in the order and regulations sought to be reviewed, and its interest sought to be protected is within the zone of interests protected by the Clean Air Act Amendments of 1970 and the constitutional guarantees in question. Congress has authorized judicial review by § 307(b)(1) of the Clean Air Act (42 U.S.C. § 1857h-5(b)(1)) and 5 U.S.C. §§ 702 and 704.

/s/ RICHARD N. CARPENTER
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-2063

[Filed December 27, 1974]

SIERRA CLUB,
Petitioner,
vs.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

**Motion and Application of Western Energy Supply and
Transmission Associates and Arizona Public Service Company
to Intervene as Respondents**

WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES (hereinafter "WEST") and ARIZONA PUBLIC SERVICE COMPANY (hereinafter "Arizona Public Service") move to intervene as respondents in this action under Rule 24, Federal Rules of Civil Procedure.

The facts and authorities upon which this Motion is based are contained in the Memorandum of Points and Authorities attached hereto and incorporated herein by this reference. [Memorandum of Points and Authorities omitted in printing.]

DATED this 26th day of December, 1974.

SNELL & WILMER

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*Attorneys for Intervenors
Western Energy Supply and
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Arizona Public Service Company*

* Member of Bar of United States Court of Appeals for
the District of Columbia Circuit.

[Certificate of Service omitted in printing]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1974

No. 74-2063

[Filed January 7, 1975]

SIERRA CLUB, 1050 Mills Tower, 220 Bush Street,
San Francisco, California 94104
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY and
RUSSELL E. TRAIN, Administrator,
Environmental Protection Agency,
Respondents.

BEFORE: Bazelon, *Chief Judge*

Order

On considerations of the motions of Western Energy Supply and Transmission Associates ("WEST") and Arizona Public Service Company ("Arizona Public Service"), The Dayton Power and Light Company, Kentucky Power Company, Kentucky Utilities Company, Ohio Edison Company, and Ohio Power Company, Utah Power & Light Company, and Edison Electric Institute ("EEI") for leave to intervene herein, it is

ORDERED that Western Energy Supply and Transmission Associates ("WEST") and Arizona Public Service Company ("Arizona Public Service"), The Dayton Power and Light Company, Kentucky Power Company, Kentucky Utilities Company, Ohio Edison Company, and Ohio Power Company, Utah Power & Light Company, and Edison Electric Institute ("EEI") are granted leave to intervene in the above case.

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Counsel for the aforesaid intervenors are encouraged to file joint briefs wherever practicable and may participate in oral argument only to the extent allowable under Rule 12 of the General Rules of this Court.

FOR THE COURT:

HUGH E. KLINE, *Clerk*

/s/ DANIEL M. CATHEY
Daniel M. Cathey
Deputy Clerk

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-2063

SIERRA CLUB, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,
Respondents
THE DAYTON POWER & LIGHT CO. ET AL., *Intervenors*

No. 74-2079

SIERRA CLUB ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,
Respondents

No. 75-1368

PUBLIC SERVICE COMPANY OF COLORADO ET AL.,
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent
SIERRA CLUB ET AL., *Intervenors*

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No. 75-1369

UTAH POWER & LIGHT COMPANY, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1370

STATE OF NEW MEXICO EX REL. NEW MEXICO
ENVIRONMENTAL IMPROVEMENT AGENCY, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1371

PACIFIC COAL GASIFICATION COMPANY ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1372

UTAH INTERNATIONAL, INC., *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

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No. 75-1575

INDIANA-KENTUCKY ELECTRIC CORPORATION ET AL.,
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent
SIERRA CLUB ET AL., *Intervenors*

No. 75-1663

THE DAYTON POWER & LIGHT COMPANY ET AL.,
Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1664

BUCKEYE POWER, INC. ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents
SIERRA CLUB ET AL., *Intervenors*

No. 75-1665

AMERICAN PETROLEUM INSTITUTE ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1666

ALABAMA POWER COMPANY ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
SIERRA CLUB ET AL., *Intervenors*

No. 75-1763

MONTANA POWER COMPANY ET AL., *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent
SIERRA CLUB ET AL., *Intervenors*

No. 75-1764

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
AND POWER DISTRICT ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,
Respondents
SIERRA CLUB ET AL., *Intervenors*Petitions for Review of Regulations Promulgated by
the Environmental Protection Agency

Argued June 9, 1976

Decided August 2, 1976

Before WRIGHT, ROBINSON, and WILKEY, *Circuit Judges*.Opinion for the court filed by *Circuit Judge Wright*.WRIGHT, *Circuit Judge*:

I. INTRODUCTION

One of the primary purposes of the Clean Air Act, 42 U.S.C. § 1857 *et seq.* (1970), is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population * * *." Section 101(b)(1), 42 U.S.C. § 1857(b)(1). Pursuant to the court order in *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253 (D. D.C. 1972), *aff'd per curiam*, 4 ERC 1815 (D.C. Cir. 1972), *aff'd by an equally divided Court, sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973), the Administrator of the Environmental Protection Agency (EPA) promulgated regulations designed to prevent "significant deterioration" of air quality in those areas which have air that already is cleaner than the national ambient air quality standards.¹ The regulations

¹ The twin objectives of the Clean Air Act are to improve air quality where pollution levels do not meet national minimum standards, and to protect the quality of air that already, as in this case, is cleaner than national standards. See Part V-A of this opinion *infra*. Accomplishment of those objectives is to be a joint enterprise of the federal government and the states, the former providing informed guidance to the implementation efforts of the latter. See §§ 101(a)(3), (4) of the Act, 42 U.S.C. §§ 1857(a)(3), (4).

Section 108 of the Act, 42 U.S.C. § 1857c-3, required the Administrator of EPA to publish a list of air pollutants which have "an adverse effect on public health or welfare." The Administrator was then to promulgate national primary and secondary ambient air quality standards for those specified pollutants. National *primary* air quality standards are those "the attainment and maintenance of which * * * are requisite to protect the public health"; national *secondary* standards are those "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." Section 109,

[continued]

employ a classification scheme under which these "clean air" regions may be designated Class I, II, or III. All

42 U.S.C. § 1857e-4. The Administrator has promulgated national primary and secondary air quality standards for six pollutants: sulfur dioxide, particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons, and nitrogen dioxide. 40 C.F.R. §§ 50.4—50.11 (1975).

The states are charged with the duty to develop implementation plans designed to achieve the level of air quality prescribed by the national primary and secondary standards:

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

Section 107, 42 U.S.C. § 1857e-2. The plans are submitted to the Administrator for approval under the provisions of § 110 of the Act, 42 U.S.C. § 1857e-5 (1970), *as amended* (Supp. IV 1974). A proposed implementation plan must satisfy the requirements of § 110(a)(2)(A)-(II), 42 U.S.C. § 1857e-5(a)(2)(A)-(H), which requirements include attainment of the national primary standards within three years after approval of the plan, and attainment of the secondary standards within a "reasonable time." Section 110(a)(2)(A), 42 U.S.C. § 1857e-5(a)(2)(A).

Section 110 also provides that the Administrator is promptly to prepare and publish his own regulations for a state if (a) it fails to submit a plan, (b) the plan "is determined by the Administrator not to be in accordance with the requirements of this section," or (c) the state fails to revise its plan pursuant to a provision required by § 110(a)(2)(H). Section 110(c)(1), 42 U.S.C. § 1857e-5(c)(1) (Supp. IV 1974). Subsection (c)(1) of § 110 also contains a conditional hearing requirement for these "replacement" implementation plans: "If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation." Subsection (a)(2)(H) requires that an implementation plan provide for revision (i) to take account of changes in either technology or the national standards and (ii) whenever the Administrator determines that the plan is inadequate to achieve the primary or secondary standards.

The basic structure described above is supplemented by § 111 of

such areas initially are designated Class II, under which specified increments in sulfur dioxide and particulate matter pollution are considered "insignificant." A state, Indian territory, or federal land may be redesignated after hearing and by application to EPA. Designation as Class I implies a region of very clean air, in which relatively small increments in air pollution would be considered significant deterioration; Class III areas are those in which deterioration of air quality to the national ambient air quality standards would be considered insignificant.

The court has heard the regulations attacked from several perspectives. Petitioner Sierra Club contends that the regulations fail, in a variety of ways, to prevent significant deterioration of existing clean air. The States of New Mexico, Wyoming, and California² agree in some

respects with Sierra Club, but are concerned that the regulations infringe on the general regulatory authority vested in the states by the Clean Air Act. A large number of electric power companies and industrial organizations have argued that the regulations are not authorized by the Clean Air Act, that their promulgation was procedurally defective, that the allowable increments are arbitrary and capricious, and that the regulatory structure created by the regulations is unconstitutional.

the Act, 42 U.S.C. § 1857e-6 (1970), *as amended* (Supp. IV 1974), which provides for promulgation of "standards of performance" for emission limitations of significant new sources of pollution, by categories of sources. The standards must reflect "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated."

² The three named states are joined by Maine, Alabama, Colorado, Kansas, Minnesota, South Dakota, and Florida.

We conclude that the Administrator's action is rationally based and has not been shown to be either without his authority or unconstitutional. We therefore do not disturb the regulations as promulgated.

II. LITIGATION HISTORY

Suit was filed in May 1972 by the Sierra Club and other environmental protection groups for a declaratory judgment that the Clean Air Act prohibited approval of state implementation plans which permitted significant deterioration of air cleaner than the national secondary standards, and for injunctive relief to prevent the Administrator from approving those portions of state implementation plans which would permit significant deterioration. District Judge John H. Pratt granted plaintiffs' motion for a preliminary injunction and declared invalid an EPA regulation³ which had required only that state implementation plans "be adequate to prevent . . . ambient pollution levels from exceeding . . . [the applicable] secondary standard." *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253 (D. D.C. 1972). The Administrator was enjoined from approving any state plan "unless he approves the state plan subject to subsequent review by him to insure that it does not permit significant deterioration of existing air quality in any portion of any state where the existing air quality is better than one or more of the secondary standards promulgated by the Administrator."⁴

As is apparent from the provisions of the Clean Air Act outlined above,⁵ prohibition of significant deterioration of air cleaner than the national standards is not an

³ 40 C.F.R. § 51.12(b) (1975).

⁴ *Sierra Club v. Ruckelshaus*, Civil Action No. 1031-72 (D. D.C. May 30, 1972), JA Vol. IV at 1487.

⁵ See note 1 *supra*.

express requirement of the Act. Judge Pratt based his decision, rather, on the "protect and enhance" language of Section 101(b)(1) of the Act and on the legislative history of both the Clean Air Act of 1970 and the Air Quality Act of 1967.⁶ The decision was affirmed *per curiam* by this court, 4 E.R.C. 1815 (1972), and was affirmed by an equally divided Supreme Court, *sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973).

Pursuant to that order, the Administrator reviewed and disapproved all state plans insofar as they failed to provide for prevention of significant deterioration. 37 Fed. Reg. 22836 (November 9, 1971). Four alternative sets of regulations were proposed for public comment, in an effort to determine what meaning to give the concept of "significant deterioration."⁷ Final regulations were pub-

⁶ The legislative history is discussed at notes 32-38 *infra*.

⁷ 38 Fed. Reg. 18986 (July 16, 1973). In proposing alternative solutions, EPA posed for public debate the problem of how significant deterioration was to be defined:

The basis for preventing significant deterioration . . . lies in a desire to protect aesthetic, scenic, and recreational values, particularly in rural areas, and in concern that some air pollutants may have adverse effects that have not been documented in such a way as to permit their consideration in the formation of national ambient air quality scientific data on the kind and extent of adverse effects of air pollution levels below the secondary standards, significant deterioration must necessarily be defined without a direct quantitative relationship to specific adverse effects on public health and welfare.

.

The relative significance of air quality versus economic growth may be a variable dependent upon regional conditions. For example, relatively minor deterioration of the aesthetic quality of the air may be very significant in a recreational area in which great pride (and economic development) is derived from the "clean air." Conversely, in areas with severe

[continued]

lished December 5, 1974, 39 Fed. Reg. 42509, and were amended slightly on January 16, 1975 (40 Fed. Reg. 2802), June 12, 1975 (40 Fed. Reg. 25004), and September 10, 1975 (40 Fed. Reg. 42011).

III. THE REGULATIONS

In promulgating final regulations⁸ EPA was concerned primarily with the meaning of "significant deterioration." As it stated in the discussion preceding the new regulations:

Most of the comments implicitly recognized that there is a need to develop resources in presently clean areas of the country, and that significant deterioration regulations should not preclude all growth, but should ensure that growth occurs in an environmentally acceptable manner. However, there are some areas, such as national parks, where any deterioration would probably be viewed as significant. A single nationwide deterioration increment would not be able to accommodate these two situations.

39 Fed. Reg. at 42520. The solution was to prescribe, for those areas with air cleaner than the national standards, three classes of allowable total increments above the levels of particulate matter and sulfur dioxide pollution as of

unemployment and little recreational value, the same level of deterioration might very well be considered "insignificant" in comparison to the favorable impact of new industrial growth with resultant employment and other economic opportunities. Accordingly, the definition of what constitutes significant deterioration must be accomplished in a manner to minimize the imposition of inequitable regulations on different segments of the Nation.

Id. at 18987, 18988.

⁸ "Prevention of Significant Air Quality Deterioration," 39 Fed. Reg. 42510 (Dec. 5, 1974).

January 1, 1975, with the intention that each area could determine which class would prevent significant deterioration of its air in light of the area's air quality and social and economic needs and objectives:

Class I applie[s] to areas in which practically any change in air quality would be considered significant; Class II applie[s] to areas in which deterioration normally accompanying moderate well-controlled growth would be considered insignificant; and Class III applie[s] to those areas in which deterioration up to the national standards would be considered insignificant.

* * *

Since the consideration of "air quality factors" alone essentially leads to an arbitrary definition of what is "significant," this term only has meaning when the economic and social implications are analyzed and considered. Therefore, the Administrator believes that it is most important to recognize and consider these implications, since the consideration of air quality factors alone provides no basis for selecting one deterioration increment over another.

Id. The regulations, 40 C.F.R. §§ 52.01(d), (f), and 52.21 (1975), were promulgated as amendments to the disapproved state implementation plans.⁹

All areas initially are designated Class II,¹⁰ and may be redesignated by proposal of state, federal land manager,

⁹ Part 52 of 40 C.F.R. "sets forth the Administrator's approval and disapproval of State plans and the Administrator's promulgation of such plans or portions thereof." 40 C.F.R. § 52.02(a) (1975). Each state implementation plan has been amended to incorporate by reference the new regulations. *See, e.g.*, 40 C.F.R. §§ 52.96 (Alaska), 52.144 (Arizona), 52.181 (Arkansas).

¹⁰ 40 C.F.R. § 52.21(c)(3)(i) (1975).

or Indian governing body where the state has not assumed jurisdiction over Indian lands.¹¹ Federal land may be designated only to a more restrictive classification than that provided by the state(s) in which it is located.¹²

A state may redesignate if a hearing is held after notice to states, federal land managers, and Indian governing bodies that may be affected,¹³ and if the proposed redesignation is based on the record of the hearing,

which must reflect the basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the areas being proposed for redesignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interests.¹⁴

A redesignation is to be approved if the state has complied with the listed requirements, has not "arbitrarily and capriciously disregarded" the considerations listed in the passage quoted above, and has undertaken the new source review requirements of Sections 52.21(d) and (e), discussed below.¹⁵ 40 C.F.R. § 52.21(c)(3)(vi)(a) (1975).¹⁶

¹¹ 40 C.F.R. §§ 52.21(c)(3)(ii), (iii), (iv), (v) (1975).

¹² 40 C.F.R. § 52.21(c)(iv) (1975).

¹³ 40 C.F.R. §§ 52.21(c)(3)(ii)(a)-(c) (1975).

¹⁴ 40 C.F.R. § 52.21(c)(3)(ii)(d) (1975).

¹⁵ See discussion at notes 20-23 *infra*.

¹⁶ In the event of a protest by a state or Indian governing body to a redesignation proposed by another state, federal land manager, or Indian governing body, the Administrator may approve the proposal "only if he determines that in his judgment the redesignation appropriately balances considerations of growth anticipated in the area proposed to be redesignated; the social, environmental and economic effects of such redesignation upon the area being redesignated and upon other areas and States; and any impacts upon regional or national interests." 40 C.F.R. § 52.21(c)(3)(vi)(e) (1975).

Federal land managers and Indian governing bodies are subject to requirements parallel to those imposed on the states, with the added requirement that they consult with the state(s) in which they are located.¹⁷

If an area is designated as Class I or II, the allowable incremental pollution is measured from January 1, 1975.¹⁸ No increments are specified for Class III; areas so designated are required to meet only the national secondary standards.¹⁹

Enforcement of the limitation on incremental pollution is accomplished partly through preconstruction review of 19 categories of stationary sources considered to be significant sources of pollution.²⁰ Permission to construct or to modify significantly one of the listed stationary sources is conditioned on a showing that the source's emissions, together with all other increases or decreases in emissions in the area since January 1, 1975, will not violate the air

nated and upon other areas and States; and any impacts upon regional or national interests." 40 C.F.R. § 52.21(c)(3)(vi)(e) (1975).

¹⁷ 40 C.F.R. §§ 52.21(c)(3)(iv), (v) (1975).

¹⁸ 40 C.F.R. § 52.21(c)(2)(i) (1975). The increments are prescribed in the following table, included in the cited subsection:

Pollutant	Class I (ug/m ³)	Class II
Particulate matter:		
Annual geometric mean	5	10
24-hr. maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hr. maximum	5	100
3-hr. maximum	25	700

¹⁹ 40 C.F.R. § 52.21(c)(2)(ii) (1975).

²⁰ 40 C.F.R. § 52.21(d)(1)(i)-(xix) (1975).

quality increments applicable to *any* area.²¹ The source also must meet an emission limit, specified by the Administrator, "which represents that level of emission reduction which would be achieved by the application of best available control technology, as defined in § 52.01(f), for particulate matter and sulfur dioxide."²² Preconstruction review of new proposed sources will be conducted by the Administrator or, by delegation, by the individual states.²³

Last, it should be noted that the described classification scheme is no procrustean bed to which all states are to be bound. The states retain the option of proposing an alternative method of preventing significant deterioration of air quality, thereby abandoning the regulatory framework described by the regulations under review. As EPA stated in proposing regulations:

The State plans need not be identical to the regulations proposed herein, but should be developed to accommodate more appropriately individual conditions and procedures unique to specific State and local areas. States are urged to develop and submit individual plans as revisions to State Implementation Plans as soon as possible. When individual State Implemen-

²¹ 40 C.F.R. § 52.21(d)(2)(i) (1975), *as amended*, 40 Fed. Reg. 42011 (Sept. 10, 1975).

²² 40 C.F.R. § 52.21(d)(2)(ii) (1975). "Best available control technology" is defined as equivalent to the new source performance standards promulgated under § 111 of the Clean Air Act, 42 U.S.C. § 1857c-6. *See* discussion at note 1 *supra*. If no standard of performance has been promulgated for a source, best available control technology is determined on a case-by-case basis. 40 C.F.R. § 52.01(f) (1975).

²³ 40 C.F.R. § 52.21(f) (1975). *See also* 40 C.F.R. § 52.21(d)(4) (1975), which provides for cooperation between the Administrator and federal land managers for review of new sources on federal land, and between the Administrator and the Secretary of the Interior as to lands over which a state has not assumed jurisdiction.

tation Plan revisions are approved as adequate to prevent significant deterioration of air quality, the applicability of the regulations proposed herein will be withdrawn for that State.

39 Fed. Reg. at 31000 (August 27, 1974).

IV. STANDARD OF REVIEW

It is well settled that EPA rulemaking is reviewed under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 706(2) (A)-(D) (1970). *Ethyl Corp. v. EPA*, — U.S. App.D.C. —, —, — F.2d —, —, slip op. at 66-74 (No. 73-2205, decided March 19, 1976). We must determine whether the Agency's action, findings, and conclusions are invalid as procedurally defective (§ 706(2) (D)), in excess of legislative authority (§ 706(2)(C)), unconstitutional (§ 706(2)(B)), or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (§ 706(2)(A)).

The "arbitrary and capricious" standard requires that agency action be affirmed if a rational basis exists therefore²⁴; it is not for us to inquire into whether the decision is wise as a matter of policy, for that is left to the discretion and developed expertise of the agency.²⁵ The Supreme Court has cautioned, with respect to review under the "arbitrary and capricious" standard, that the reviewing court is limited to deciding whether there has been a "clear error of judgment * * *". Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to sub-

²⁴ *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974).

²⁵ *National Ass'n of Food Chains, Inc. v. ICC*, — U.S. App. D.C. —, —, — F.2d —, —, slip op. at 13 (No. 75-1471, decided May 18, 1976) (*per curiam*).

stitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1972). See *Ethyl Corp. v. EPA*, *supra*, — U.S.App.D.C. at — n.74, — F.2d at — n.74, slip op. at 69 n.74.

We therefore must assure ourselves that the Agency has presented a rational basis for its decision²⁶; that it "demonstrably has given reasoned consideration to the issues, and has reached a result which rationally flows from its conclusions."²⁷

V. ARGUMENT

A. Should *Sierra Club v. Ruckelshaus* be rejected on further consideration?

The question whether the Clean Air Act should be interpreted to prohibit significant deterioration of air cleaner than the national standards is necessarily the first level of analysis. Although this issue was decided by the earlier *Sierra Club v. Ruckelshaus* litigation, it is contended by the industrial petitioners (1) that the decision was clearly wrong on the merits and should be reconsidered and (2) that the later decision in *Train v. NRDC*, 421 U.S. 60 (1975), and enactment of the Energy Supply and Environmental Coordination Act of 1974, 88 STAT. 246, are inconsistent with the prior decision in *Sierra Club v. Ruckelshaus*.

²⁶ We note that the basis of agency action must be provided by the agency; an order "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding . . ." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); see *National Ass'n of Food Chains, Inc. v. ICC*, *supra* note 25, — U.S.App.D.C. at —, — F.2d at —, slip op. at 12-13.

²⁷ *National Ass'n of Food Chains, Inc. v. ICC*, *supra* note 25, — U.S.App.D.C. at —, — F.2d at —, slip op. at 14.

The first argument obviously would require the clearest showing that *Sierra Club v. Ruckelshaus* was incorrectly decided, since Judge Pratt's decision was affirmed by both another panel of this court and an equally divided Supreme Court. It is posited that neither the "protect and enhance" language of Section 101(b)(1) nor the legislative history of the Clean Air Act need to be read to impose a requirement of nondeterioration; petitioners then point out that, to the contrary, a 1970 amendment to the Act, Section 110(a)(2), 42 U.S.C. § 1857c-5(a)(2), states that the Administrator "shall approve" a state implementation plan which meets the criteria listed in that section, none of which implies a nondeterioration standard. The conclusion advanced by petitioners is that the judicially-created requirement of nondeterioration violates this plain language of the 1970 amendment.

When a specific provision of a total statutory scheme reasonably may be construed to be in conflict with the congressional purpose expressed in the act, our first task is to examine the act's legislative history to determine whether the specific provision is reconcilable and consistent with the intent of Congress.²⁸ We find, in the legislative history of the Clean Air Act of 1970, a clear understanding that the Act embodied a pre-existing policy of nondeterioration of air cleaner than the national standards. Inasmuch as we find no support for the proposition that the addition of Section 110(a)(2) was intended to limit that policy in any way, we reaffirm our prior holding in *Sierra Club v. Ruckelshaus*.

The "protect and enhance" language of the Clear Air Act was added by the Air Quality Act of 1967, 81 STAT.

²⁸ See *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968): "[W]e cannot, in the absence of an unmistakable directive, construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate."

485.²⁹ The administrative interpretation and, to a lesser degree, the legislative history of the Air Quality Act expressed a policy of nondeterioration,³⁰ and that policy appears generally to have been accepted at the time of the addition of the Clean Air Act amendments of 1970.

In the Senate hearings on the Clean Air Act amendments of 1970, the officials charged with implementation of the 1967 Act expressed their clear understanding that the "protect and enhance" language of Section 101 mandated the policy of nondeterioration. HEW Secretary Rob-

²⁹ *Air Quality Act of 1967*, S. Rep. No. 91-403, 90th Cong., 1st Sess. 40 (1967).

³⁰ *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253, 255 (D. D.C. 1972); ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW, 1974 at 1077-1080. The Senate committee report on the Air Quality Act emphasized that the Act would apply to all areas of the country, and quoted Senator Muskie for the proposition that it was necessary "to assure the lessening of current levels of pollution and to prevent further environmental deterioration in the future." *Air Quality Act of 1967*, *supra* note 29, at 2-3, 8.

The Act was administered by the National Air Pollution Control Administration of the Department of Health, Education and Welfare, which formalized the concept of nondeterioration in its Guidelines for the Development of Air Quality Standards and Implementation Plans, Part I, § 1.51 at 7 (1969):

"[A]n explicit purpose of the Act is "to protect and enhance the quality of the Nation's air resources" (emphasis added). Air quality standards which, even if fully implemented, would result in significant deterioration of air quality in any substantial portion of an air quality control region clearly would conflict with this expressed purpose of the law.

See generally, *Non-Degradation—Clean Air Act and Amendments Held to Mandate a Policy Prohibiting Significant Deterioration of Air Quality in Areas of Relatively Clean Air*, 2 FORDHAM URBAN L. J. 136 (1973) (hereinafter *Clean Air Act Held to Prohibit Significant Deterioration*); *The Clean Air Act and the Concept of Non-Degradation: Sierra Club v. Ruckelshaus*, 2 ECOLOGY L. Q. 801 (1971) (hereinafter *The Concept of Non-Degradation*).

ert H. Finch testified as follows in a statement presented by Undersecretary John Veneman:

In their implementation plans, the States would have to spell out the measures to be taken to achieve and preserve national air quality standards. As I have indicated, they would have the option of designing their implementation plans to achieve or preserve higher than national quality levels, if they wished to do so.

As you know, one of the express purposes of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources" * * *. Accordingly, it has been and will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with this provision. We shall continue to expect States to maintain air of good quality where it now exists.

Air Pollution—1970, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, Part I, 132-133 (1970). Undersecretary Veneman went on to state that "[i]t will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with the provisions of the Act. We do not intend to condone 'backsliding.' If an area has air quality which is better than the national standards, they would be required to stay there and not pollute the air ever further, even though they may be below national standards." *Id.* at 143.

The Senate committee report gave express recognition to the concept of nondeterioration, directing that

[i]n areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementation plan which does not provide, to the maximum ex-

tent practicable, for the continued maintenance of such ambient air quality. Once such national goals are established, deterioration of air quality should not be permitted except under circumstances where there is no available alternative.

S. Rep. No. 91-1196, 91st Cong., 2d Sess. 11 (1970) (emphasis added). Quite to the contrary, however, there was no particular significance ascribed to the "shall approve" language of the section which became Section 110(a)(2). *Id.* at 11-15.

The explanation of this omission in the legislative history appears to be that the 1970 amendments were aimed at states that refused to take action to improve their air quality. The background of the 1970 amendments was described in *Train v. NRDC*, *supra*, 421 U.S. at 64:

The response of the States to these manifestations of increasing congressional concern with air pollution was disappointing. Even by 1970, state planning and implementation under the Air Quality Act of 1967 had made little progress. Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970 * * *.

The "stick" was the group of express requirements as to the content of state implementation plans.³¹ The "shall

³¹ "The Committee recognized that because the proposed bill would require a great deal in a short period of time and because the brevity of the provision in existing law has lead to uneven and inadequate interpretation, the character of an implementation plan must be specified and the alternative methods of achievement listed. The Committee bill would require that a rigorous time sequence be met in the development of the implementation plan and would provide for the substitution of Secretarial authority if the State plan, or a portion thereof, is inadequate to attain the quality of ambient air established by the nationally promulgated ambient air quality standard." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 12 (1970).

approve" language was addressed to the administrative problems that would be caused by a requirement that all states submit complying implementation plans within a limited time; the provisions of Section 110(a) are, more than anything else, a summary of the mandatory requirements for all state implementation plans.³² We have, however, found no indication, nor have we been cited to any indication in the legislative history, that Section 110 was intended in any way to vitiate the nondeterioration mandate contained in the Senate report.³³

This court has recently cautioned that a failure by Congress expressly to reject the administrative construction of an act need not, without more, indicate congressional acquiescence in the agency interpretation.³⁴ In *Chisholm v. FCC*, — U.S. App.D.C. —, — F.2d — (No. 75-

³² See note 31 *supra*.

³³ See *The Concept of Non-Degradation*, *supra* note 30, at 819:

The legislative history does support the contention that the principle of non-degradation is implicit in the Clean Air Act. It resolves the vagueness of both the purpose clause and section 110. Although the history of the 1967 Act conveys an ambiguous picture of the legislative intent, the history of both the 1970 Amendments and the later Implementation Hearings clearly indicates that Congress confronted the complexities of air pollution control and undertook a program designed to prevent the deterioration of clean air.

³⁴ *Chisholm v. FCC*, — U.S.App.D.C. —, — F.2d —, —, slip op. at 26 (No. 75-1951, decided April 12, 1976):

We begin by noting that attributing legal significance to Congressional inaction is a dangerous business * * *. The Supreme Court has said that Congressional failure to repudiate particular decisions "frequently betokens unawareness, preoccupation, or paralysis" rather than conscious choice, *Zuber v. Allen*, 396 U.S. 168, 185-86 n. 21 (1969), and "affords the most dubious foundation for drawing positive inferences," *United States v. Price*, 361 U.S. 304, 310-11 (1960) (Harlan, J.).

1951, decided April 12, 1976), the court refused to ascribe significance to congressional inaction when it appeared that Congress was "aware" of the administrative interpretation only "in a technical sense." — U.S. App.D.C. at —, — F.2d at —, slip op. at 27. We are not presented with that situation. Not only was the Agency's interpretation of the Air Quality Act of 1967 as mandating prevention of significant deterioration clearly before the Congress in 1970, but the committee reports contain express language that the principle of nondeterioration was preserved by the Clean Air Act Amendments of 1970.

This sort of express congressional recognition of the implementing agency's statutory construction can be extremely significant in interpreting legislative intent. In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), for instance, the Court found approval of a long-standing administrative interpretation in Congress' studied inaction:

In addition to the importance of legislative history, a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.

416 U.S. at 274-275. The Court reached similar results in *Zemel v. Rusk*, 381 U.S. 1, 11 (1965) (administration of Passport Act of 1926); *C. I. R. v. Estate of Noel*, 380 U.S. 678, 682 (1965); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 365-366 (1951); *Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110, 114-225 (1939); and *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 313 (1933), among others.

In the instant case there is every indication that Congress intended in 1970 to continue a policy of prevention

of significant deterioration of air quality. In addition, we find nothing in the legislative history to indicate that Congress had any desire or intention that the 1970 amendments hinder the fight against air pollution by voiding the principle of nondeterioration.

It is significant in this regard that recent congressional statements have supported the historic existence of a requirement of nondeterioration. The report of the House Committee on Interstate and Foreign Commerce on the proposed Clean Air Act Amendments of 1976 (H.R. Rep. No. 94-1175, May 15, 1976) endorses a new statutory definition of nondeterioration, commenting that "[t]he Committee has developed this section to provide clearer definition of the nearly decade-old policy (reflected in section 101 (b) of the Act) that significant deterioration of clean air must be avoided, and to provide more specific congressional guidance as to how this policy is to be implemented." *Id.* at 83. A contemporaneous report of the Senate Committee on Public Works on similar proposed amendments has both restated the language quoted above from the 1970 Senate report³⁵ and reaffirmed the continuing policy of nondeterioration:

A nondegradation policy was articulated first in Federal water pollution law. That was in 1965. The concept was incorporated into the 1967 Air Quality Act, which stated that a basic purpose of the Act was to "protect and enhance the quality of the Nation's air resources." That language was not altered by the 1970 Clean Air Amendments. This bill clarifies and details that policy.

Clean Air Amendments of 1976, S. Rep. No. 94-717 at 20 (March 29, 1976). It would fly in the face of overwhelming evidence of legislative intent to hold that the Clean Air

³⁵ See pp. [19a-20a] *supra*.

Act does not contain a requirement of prevention of significant deterioration.

Our belief that *Sierra Club v. Ruckelshaus* was decided properly is bolstered by its acceptance in a number of other circuits.³⁶ Petitioners suggest, however, that the later decision in *Train v. NRDC*, 421 U.S. 60 (1975), and enactment of the Energy Supply and Environmental Coordination Act of 1974, 88 STAT. 246, are necessarily inconsistent with the concept of nondeterioration of air quality. We reject both contentions.

Train v. NRDC involved construction of the "shall approve" language of Section 110(a)(3)(A),³⁷ which requires that the Administrator approve revisions of state plans which, after revision, meet the criteria of Section 110(a)(2). The Court held that state action which grants a variance to an individual pollution source must be approved by the Administrator if the approval will not expand the time for compliance with national primary ambient air quality standards³⁸ or otherwise violate the re-

³⁶ See *NRDC v. EPA*, 489 F.2d 390, 408 (5th Cir. 1974), *rev'd on other grounds, sub nom. Train v. NRDC*, 421 U.S. 60 (1975); *Big Rivers Electric Corp. v. EPA*, 8 ERC 1092 (6th Cir. 1975); *Union Electric Co. v. EPA*, 515 F.2d 206, 220 (8th Cir. 1975), *aff'd on other grounds, — U.S. —*, 44 U.S. L. WEEK 5060 (June 25, 1976); *NRDC v. EPA*, 507 F.2d 905, 913 (9th Cir. 1974). Cf. *Highland Park v. Train*, 519 F.2d 681, 685 (7th Cir. 1975).

³⁷ "The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph 2 [§ 110(a)(2)] and has been adopted by the State after reasonable notice and public hearings." Section 110(a)(3)(A), 42 U.S.C. § 1857c-5(a)(3)(A) (Supp. IV 1974).

³⁸ Section 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A) (1970): The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable

requirements of Section 110(a)(2). In the following passage, strongly pressed upon us by petitioners, the Court emphasized the mandatory language of Section 110(a)(2):

The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards.

421 U.S. at 79 (emphasis in original).³⁹ It is argued that this decision removes from the Administrator the discre-

notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained[.]

³⁹ The language was repeated in *Hancock v. Train*, — U.S. —, —, 44 U.S. L. WEEK 4767, 4768 (June 7, 1976) (dictum), which concerned the obligation of federal facilities to comply with the requirements of state implementation plans.

tion to disapprove a plan which complies with Section 110(a)(2), and therefore requires that *Sierra Club v. Ruckelshaus* be overturned. This argument, however, is subject to the same analysis by which we reject the argument based on Section 110(a)(2) alone. Unlike the instant case, *Train* was concerned with air pollution below the national standards, and the question was whether individual variances would prevent the states from achieving the standards within the prescribed time limits. The Supreme Court in *Train* did not consider the issue of nondeterioration, even though the decision below was based in part on *Sierra Club v. Ruckelshaus*.⁴⁰ Rather than assume, as the industrial petitioners would have us, that *Train* silently overturned the earlier divided affirmance in *Sierra Club*, we find it more reasonable to conclude that the Court did not address the issue, and we reject the argument based on *Train*.

In another recent decision, *Union Electric Co. v. EPA*, — U.S. —, 44 U.S. L. WEEK 5060 (June 25, 1976), the Supreme Court found challenges to state implementation plans based on economic infeasibility to be barred by the mandatory nature of Section 110(a)(2). The Court found in the legislative history of the 1970 amendments a congressional determination that clean air objectives should take precedence over claims of economic or technological infeasibility:

As we have previously recognized, the 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise unchecked problem of air pollution. The Amendments place the primary responsibility for formulating pollution control strategies on the States, but nonetheless

⁴⁰ *NRDC v. EPA*, *supra* note 36, 489 F.2d at 408. The *Train* decision was limited expressly to the question of approval of variances. 421 U.S. at 69-70.

subject * * * the States to strict minimum compliance requirements. These requirements are of a "technology-forcing character," *Train v. NRDC*, 421 U.S., at 91, and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.

This approach is apparent on the face of § 110(a)(2). The provision sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator "shall approve" the proposed state plan. The mandatory "shall" makes it quite clear that the Administrator is not to be concerned with factors other than those specified, *Train v. NRDC*, 421 U.S., at 71 n. 11, 79, and none of the eight factors appears to permit consideration of technological infeasibility.

— U.S. at —, 44 U.S. L. WEEK at 5063. Although the Court stressed the "shall approve" language of Section 110(a)(2), its construction was founded on a concern that the congressional mandate of prompt implementation of pollution control plans not be disserved. The Court was not presented with the distinct question whether the "shall approve" language of Section 110(a)(2) must be read to subvert the concomitant congressional directive that significant deterioration of air cleaner than the national standards be prevented.⁴¹ Thus, despite the emphasis placed on (a)(2) by the opinions in *Train v. NRDC* and

⁴¹ As was the case in *Train v. NRDC*, the lower court in *Union Electric* expressly had approved the concept of prevention of significant deterioration. *Union Electric Co. v. EPA*, *supra* note 36, 515 F.2d at 220 n.39. The Supreme Court affirmed the Court of Appeals without mentioning that issue.

Union Electric, we do not believe the result in the instant case is controlled by either opinion.

Petitioners also rely on the Energy Supply and Environmental Coordination Act of 1974 (ESECA), which was enacted to encourage stationary fuel-burning sources to convert from oil to coal, to minimize the nation's dependence on imported oil. Among other things, it (1) authorized the Federal Energy Administration to require power plants and other major fuel-burning sources to burn coal, (2) amended the Clean Air Act to provide a limited exemption from stationary source requirements to those converting facilities,⁴² and (3) required the Administrator of EPA to review the implementation plan of each state and notify any state which could revise its plan as to stationary fuel-burning sources without violating the national ambient air quality standards.⁴³ The ESECA is accommodated in the "significant deterioration" regulations by 40 C.F.R. § 52.21(d)(1), which exempts from preconstruction review modifications "to utilize an alternative fuel, or higher sulfur content fuel."

Although conversion to "dirtier" fuels such as coal certainly will impair both improvement and maintenance of air quality, there is no reason to believe that passage of ESECA was intended to eliminate the requirement of non-deterioration.⁴⁴ The amendment was a necessary response

⁴² Section 119, 42 U.S.C. § 1857c-10 (Supp. IV 1974).

⁴³ Section 110(a)(3)(B), 42 U.S.C. § 1857c-5(a)(3)(B) (Supp. IV 1974).

⁴⁴ The "purpose" section of ESECA, 15 U.S.C. § 791 (Supp. IV 1974), is as follows:

The purposes of this chapter are (1) to provide for a means to assist in meeting the essential needs of the United States for fuels, *in a manner which is consistent, to the fullest extent practicable, with existing national commitments to protect and*

to the nationwide shortage of oil and natural gas, and no reason has been presented for ascribing to it a greater significance.⁴⁵

We therefore find no substantial reason to question under ESECA or *Train*, the continuing validity of *Sierra Club v. Ruckelshaus*, and we proceed to the substance of the regulations under review using that decision as our guide.

B. Are the regulations invalid on the ground that only two of the six primary air pollutants are considered?

The regulations provide for control only of particulate matter and sulfur dioxide emissions,⁴⁶ whereas the Administrator also has identified carbon monoxide, nitrogen oxides, hydrocarbons, and photochemical oxidants as air pollutants which have an adverse effect on public health or welfare.⁴⁷ It is contended that the regulations violate the District Court's order in *Sierra Club v. Ruckelshaus* by failing to prevent significant deterioration of air quality with respect to those four pollutants.⁴⁸

improve the environment, and (2) to provide requirements for reports respecting energy resources.

(Emphasis added.)

⁴⁵ We also reject the argument that it is "unfair" to count the increased emissions from a source that is converted to coal against the allowable pollution increment for the area, since that modification is exempted from preconstruction review. We see no reason why a state in which major utilities have been forced to convert to coal may not choose to impose commensurately stricter standards on the remainder of the area.

⁴⁶ See note 18 *supra*.

⁴⁷ 40 C.F.R. §§ 50.8-50.11 (1975).

⁴⁸ The order required that the Administrator "prepare and publish proposed regulations, pursuant to 42 U.S.C. § 1857c-5(e), as to
[continued]

EPA has responded that the interrelationships among those four pollutants, and the relationships between incremental increases in those pollutants and deterioration of air quality, are poorly understood and cannot be determined with any reasonable degree of accuracy:

These [four pollutants] are commonly referred to as "automotive pollutants," because the automobile is the major source of each of them * * *. The first three (HC, NO₂ and O₃) are also known as "photochemical" or "reactive" pollutants, because under the influence of sunlight, they enter into a complex chemical reaction in the atmosphere. * * * The rate at which the reaction occurs depends on a number of variables, including temperature, humidity, solar intensity, and the concentrations of the input pollutants. * * *

The chief reason for excluding photochemical pollutants from these regulations is that the relationship between the emission of HC and oxides of nitrogen, on the one hand, and the resulting ambient levels of the harmful pollutants, O₃ and NO₂, on the other, is very poorly understood. The only method for relating emissions to air quality for these pollutants is the "area-wide proportional model." This model assumes, as its name suggests, that ambient pollutant levels are proportional to total emissions. The model is useful only in areas where ambient pollutant levels are substantial and well-monitored, as in urban areas with smog problems. * * * But the proportional model cannot be used to regulate air quality deterioration in clean-air areas. This is because the assumptions

any state plan which he finds, on the basis of his review, either permits the significant deterioration of existing air quality in any portion of any state or fails to take the measures necessary to prevent such significant deterioration." *Sierra Club v. Ruckelshaus*, Civil Action No. 1031-72 (D. D.C. May 30, 1972).

underlying the model do not hold in clean-air areas, and also because it is not possible to make accurate measurements of ambient levels of photochemical pollutants that are substantially below the levels of the national standards.

Br. for respondent at 32-33 (footnote omitted), *elucidating*, 39 Fed. Reg. 31006 (August 27, 1974); 39 Fed. Reg. 42511 (December 5, 1974); *Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality*, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards (January 1975), at 21-27 (JA 117-123). EPA concluded that existing technology "is inappropriate for analyzing the incremental impact of individual new sources" with respect to the four "automotive pollutants," and that "[a]t this time, the only practical approach for dealing with these pollutants appears to be to minimize emissions as much as possible." 39 Fed. Reg. 42511 (December 5, 1974). EPA further has contended that ongoing programs toward reduction of automotive emissions "are adequate to prevent any significant deterioration due to sources of carbon monoxide, hydrocarbons or nitrogen oxides." "

Petitioners have emphasized that the four omitted pollutants can have extremely adverse effects on public health and welfare, and have noted that they are emitted by stationary sources as well as by moving vehicles. Petitioners have not, however, directly clashed with EPA's contention that it does not have technology or modeling techniques rationally to regulate emissions on a case-by-case basis. This is the type of policy decision in which the Agency's developed expertise is heavily implicated, and with which the court will not tamper so long as the decision was rational and based on consideration of the rele-

" 39 Fed. Reg. 31006 (Aug. 27, 1974).

vant factors. *Ethyl Corp. v. EPA, supra*, —U.S. App. D.C. at —, —, — F.2d at —, —, slip op. at 66-74. Given the absence of any direct denials of EPA's assertions on this point, the Agency is entitled to claim the presumption of validity which attends its actions. *Id.*, slip op. at 68. We therefore hold that EPA did not act unlawfully in excluding from its regulations the four "automotive pollutants."

C. Are Class II and Class III invalid as permitting significant deterioration of air quality?

D. Is it unlawful to make determinations as to permissible air quality deterioration on the basis of considerations other than air quality?

It is argued by Sierra Club that Classes II and III, by permitting increases in sulfur dioxide and particulate matter pollution to levels which in some areas may be many times present concentrations, allow significant deterioration of air quality. The "significance" is primarily a matter of the numbers involved; although evidence has been presented that levels of pollution below the national secondary standards may have adverse health effects,⁵⁰ it is for the Administrator rather than the courts to determine that the national secondary standards no longer can be said to protect the public from "any known or anticipated adverse effects" of a pollutant. The question of significance thus leads by implication to a second line of argument—that it is unlawful to consider deterioration of air quality "insignificant" simply because it accompanies normal, controlled economic development.

⁵⁰ Br. for petitioners Sierra Club *et al.*, No. 74-2063, at 18-20. See also *Clean Air Act Amendments of 1976*, Report of the Senate Committee on Public Works, S. Rep. No. 94-717 at 19-27 (March 29, 1976); *Clean Air Act Amendments of 1976*, Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 94-1175 at 83-116 (May 15, 1976).

EPA recognized, in developing the concept of "significant deterioration" pursuant to Judge Pratt's order, that "[p]ending the development of adequate scientific data on the kind and extent of adverse effects of air pollutant levels below the secondary standards, significant deterioration must necessarily be defined without a direct quantitative relationship to specific adverse effects on public health and welfare." 39 Fed. Reg. 18987 (July 16, 1973). It therefore determined that each state must determine what level of incremental pollution, taking into account the air quality and social and economic needs and objectives of the area, would be "significant deterioration" of its air quality.⁵¹

In that context, it was a rational policy decision that the significance of deterioration of air quality should be determined by a qualitative balancing of clean air considerations against the competing demands of economic growth, population expansion, and development of alternative sources of energy. The approach provides a workable definition of significant deterioration which neither stifles necessary economic development nor permits unregulated deterioration to the national standards.⁵² We therefore find that EPA acted within the discretion it is granted as to matters of policy⁵³ in choosing this design to prevent significant deterioration of air quality.

⁵¹ See pp. [10a-11a] *supra*.

⁵² EPA acknowledges that all states theoretically could reclassify to Class III, thereby permitting unregulated deterioration to the national standards. It asks that the states not "arbitrarily and capriciously" disregard its outlined considerations before redesignating areas. 40 C.F.R. § 52.21(c)(3)(vi)(a).

⁵³ "However formal the type of agency proceeding, an agency's policy choices are reviewed under the arbitrary and capricious standard, which asks merely whether the policy choice is rationally connected to its factual basis." *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard*, 84 YALE L. J. 1750, 1751 (1975).

We may state our belief, as a general overview at this point, that for the most part it somewhat misses the mark to raise objections to the specific emission limits of the regulations under review. EPA has emphasized that the individual states are free to conceive and adopt their own methods of preventing significant deterioration. A state may use EPA's system to classify itself as industrial-metropolitan (Class III), as anticipating normal economic growth (II), or as desirous of protecting its clean air (I). But it also may develop its own scheme, based on its own needs, so long as the regulatory structure prevents significant deterioration of air cleaner than the national standards. Given the broad power vested in the states to alter or amend these regulations, we find little merit in objections to the specifics of the classification scheme itself.

E. Has the effective date of the regulations been postponed unlawfully beyond the date contemplated by the Clean Air Act?

The Clean Air Act of 1970 imposed a series of time limits for the various steps leading up to approval of state implementation plans. Under that timetable regulations should have become effective by the middle of 1972.⁵⁴

⁵⁴ The Clean Air Act Amendments of 1970 were added on Dec. 31, 1970, 84 STAT. 1677. The Administrator was given 90 days in which to propose and promulgate national primary and secondary ambient air quality standards. Section 109(a)(1)(B), 42 U.S.C. § 1857c-4(a)(1)(B). The states then were given nine months to submit proposed implementation plans to the Administrator, § 110(a)(1), 42 U.S.C. § 1857c-5(a)(1), and the Administrator had four months to approve or disapprove the plans. Section 110(a)(2), 42 U.S.C. § 1857c-5(a)(2). The Administrator was to "promptly prepare and publish" implementation plans for states which failed to submit a complying plan or which failed to revise a plan after 60 days notice. Section 110(c), 42 U.S.C. § 1857c-5(c). The target date for effectiveness of state implementation plans was therefore mid-1972.

The regulations employ two later effective dates. First, emissions increments are measured from a January 1, 1975 baseline, and all sources for which "approval" is given after that date will have their emissions counted against the allowable increment for the region. 40 C.F.R. § 52.21(d)(2)(i) (1975). Second, preconstruction review is provided only for sources which have "not commenced construction or modification prior to June 1, 1975." 40 C.F.R. § 52.21(d)(1) (1975). "'Commenced' means that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification." 40 C.F.R. § 52.21(b)(7) (1975). Compare 40 C.F.R. § 52.01(b) (1975). All later-commenced source construction must be reviewed for compliance with new source performance standards and for a determination that construction will not cause the pollution increments of any area to be violated. 40 C.F.R. § 52.21(d)(2) (1975), *as amended*, 40 Fed. Reg. 42011 (September 10, 1975).

We are asked to hold that sources for which construction was commenced after mid-1972 must be counted against the allowable pollution increments for the various regions. EPA answers that inclusion of the earlier construction would limit practical use of the regulations to regulate future development. We accept the latter position. Whatever the effect of past construction has been upon present pollution, each state must determine what will be appropriate for future air quality and economic development. So long as any state may choose to limit future development to compensate for excessive past pollution, the choice of starting dates for the applicability of the regulations appears to be irrelevant.⁵⁵ For the same reason we

⁵⁵ Similarly, we find no ground for objection to the manner in [continued]

do not believe EPA acted unreasonably in failing to count increases in pollution since 1972 against the allowable increments. It was a rational policy decision to limit the instant regulations to prospective concerns only.

F. Is it arbitrary and capricious to review proposed construction of stationary sources on the basis of compliance with the New Source Performance Standards, rather than on the basis of Best Available Control Technology on a case-by-case basis?

G. Was the Administrator required to provide for preconstruction review of all sources, rather than for "significant" sources only?

40 C.F.R. § 52.21(d)(ii) (1975) requires that new sources which are subject to preconstruction review meet the level of emissions that would be achieved by application of the Best Available Control Technology (BACT); Section 52.01(f) defines BACT as equivalent to the New Source Performance Standards (NSPS) promulgated under Section 111 of the Clean Air Act, 42 U.S.C. § 1857c-6 (1970), *amended* (Supp. IV 1974), when those standards are available. If no NSPS has been established for a category of sources, preconstruction review of emission reduction systems is done on a case-by-case basis. 40 C.F.R. §§ 52.21(d)(2)(ii), 52.01(f) (1975). The Sierra Club posits that the NSPS guidelines, defined by Section 111 as "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Ad-

which EPA has defined commencement of construction. 40 C.F.R. § 52.21(b)(7) (1975). Even if a source on which construction has "commenced" is not subject to preconstruction review, its emissions may be considered in choosing the appropriate pollution increment to be applied to the area.

ministrator determines has been adequately demonstrated," are a "lowest common denominator"-based group and are inconsistent with the policy of nondeterioration.

We accept EPA's response that case-by-case review of all new sources would not only be unworkable, but would undermine Section 111 by limiting its application of NSPS to those areas which have not yet achieved the national secondary standards. It appears, in addition, that application of NSPS rather than BACT will not of necessity lead to more total pollution; a given area still is limited to the specified increment for its classification, and the use of a less effective emission reduction system by one new statutory source will simply use up more of the allowable increment and limit opportunities for other proposed new sources. This trade-off, between types of control systems and opportunities for new source construction, is best left to the states, which by delegation will administer the preconstruction review. As the Supreme Court held in *Train v. NRDC, supra*, "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." 421 U.S. at 79. We therefore hold that the use of NSPS is rational and in accord with the Clean Air Act.

An additional challenge to the procedures for preconstruction review is based on the allegedly unlawful limitation of review to 19 specified categories of sources.⁵⁶ We

⁵⁶ The 19 listed categories are:

- (i) Fossil-Fuel Steam Electric Plants of more than 1000 million B.T.U. per hour heat input.
- (ii) Coal Cleaning Plants.
- (iii) Kraft Pulp Mills.
- (iv) Portland Cement Plants.

[continued]

find this argument subject to the analysis presented above with respect to use of NSPS rather than BACT. Review of every new source of pollution clearly would be impossible since every gas- or oil-heated house is a source of some pollution. The decision to review only those sources which emit more than 25 pounds per hour of sulfur dioxide or particulate matter⁵⁷ does not mean there will of necessity

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- (v) Primary Zinc Smelters.
 - (vi) Iron and Steel Mills.
 - (vii) Primary Aluminum Ore Reduction Plants.
 - (viii) Primary Copper Smelters.
 - (ix) Municipal Incinerators capable of charging more than 250 tons of refuse per 24 hour day.
 - (x) Sulfuric Acid Plants.
 - (xi) Petroleum Refineries.
 - (xii) Lime Plants.
 - (xiii) Phosphate Rock Processing Plants.
 - (xiv) By-Product Coke Oven Batteries.
 - (xv) Sulfur Recovery Plants.
 - (xvi) Carbon Black Plants(furnace process).
 - (xvii) Primary Lead Smelters.
 - (xviii) Fuel Conversion Plants.
 - (xix) Ferroalloy production facilities commencing construction after October 5, 1975.

40 C.F.R. § 52.21(d)(1)(i)-(xix) (1975), as amended, 40 Fed. Reg. 42011 (Sept. 10, 1975).

⁵⁷ The standard of 25 pounds/hour of emissions for addition of new categories to the list of those subject to preconstruction review was proposed on June 9, 1975 (40 Fed. Reg. 24534) and adopted Sept. 10, 1975 (40 Fed. Reg. 42011):

[T]he criteria the Administrator intends to use in adding further sources in the future * * * are:

- (1) a new source performance standard for sulfur dioxide (SO₂) or particulate matter has been established for the source or any facility of the source under Part 60 of this chapter, and (2) the established new source performance standard will allow any anticipated future plant affected by the standard to emit SO₂ or particulate matter

be more total pollution; it means only that a large number of minor sources could use up the area's allowable increment and thereby preclude construction of new major sources of pollution. As EPA stated in a document explaining its regulations:

The 18 categories which are covered by the regulation, except for fuel conversion plants, are the largest present emitters of SO₂ and TSP on a nationwide basis. Fuel conversion plants (coal gasification and liquefaction, oil shale processing, etc.) were included due to their significant growth potential, particularly in presently clean areas * * *. The air quality impact of sources not included in the 18 categories is taken into account since the total air quality deterioration above the baseline is taken into account when an application to construct a new source of one of the 18 categories reviewed.

Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality, US. Environmental Protection Agency Office of Air Quality Planning & Standards (January 1975), at 27-28. Further, it is within the power of the various states to enact more stringent controls, and expanded preconstruction review procedures, should limited review lead to problems in regulating incremental pollution. We therefore hold that the regulations are not invalid insofar as provision is made for preconstruction review of only the specified categories of stationary sources.

in excess of 25 pounds per hour from the affected facility or facilities when operating at maximum design capacity.

The latter choice also added the 19th category, Ferroalloy production facilities.

H. Are the regulations arbitrary and capricious on the ground that the allowable increments are unrelated to anticipated adverse effects on public health and welfare?

The regulations under review establish a classification scheme which is not based on demonstrated adverse air quality effects, but rather on a balancing of concerns with air quality, economic and social needs and objectives, and development of energy sources. The industrial petitioners contend that EPA is not authorized to promulgate regulations which are not related to adverse air quality effects, and that Classes I and II therefore are invalid.

The need to prevent significant deterioration of air cleaner than the national standards, and the statutory authorization therefore, was settled by the *Sierra Club v. Ruckelshaus* litigation. It clearly is a rational legislative purpose to protect and enhance the quality of the nation's air, even in the absence of quantified evidence of adverse effects.⁵⁸

⁵⁸ EPA emphasized in promulgating regulations that levels of pollution below the national standards still may have some adverse effects:

Limitations on air quality that result in cleaner air than the national ambient air quality standards cannot • • • be based on any quantitative measure of harm to either public health or welfare. This is not, however, to say that there are no possible unquantified adverse effects on public health or welfare below the levels of the national standards. Examples of such unquantified effects involve the transformation of sulfur dioxide into suspended sulfates and sulfuric acid aerosols, resulting in possible effects on health, visibility, climatic changes, acidity of rain, and deterioration of materials.

Since there is no way to relate "significance" of deterioration of air quality to any adverse effects resulting from air quality levels cleaner than the national standards, EPA concluded that the determination of what is "significant" deterioration must take into account factors other than air quality

The District Court order in *Sierra Club v. Ruckelshaus* mandated that EPA enforce this legislative purpose by preventing significant deterioration of air quality, but left definition of "significant" to the Agency. EPA's solution was a definition created by its own implementation; each state's evaluation of the relative importance of the competing interests which surround continued maintenance of air quality will determine what level of deterioration would be significant for that state. The three classifications thus are not intended to represent a scientific conclusion as to what constitutes significant deterioration; rather, they are suggested frameworks for use by the states after independent evaluation. Because the regulations do not purport to be mandatory requirements based on scientific research, they properly cannot be judged by asking whether the increments are related to demonstrated health effects. As we have noted above, any state could adopt even more stringent regulations by proposing its own revision to its implementation plan.⁵⁹

We therefore find insubstantial the objection that the varying allowable increments presented in the instant regulations are unrelated to demonstrated adverse health effects. The regulations flow from a valid legislative goal,

alone. For example, relatively minor deterioration of the aesthetic quality of the air may be very significant in a recreational area in which great pride (and economic development) is derived from the "clean air."

Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality, U.S. Environmental Protection Agency, Office of Air Quality Planning & Standards (January 1975), at 6. See also *Clean Air Act Amendments of 1976*, Report of the Senate Committee on Public Works, S. Rep. No. 94-717 at 19-27 (March 29, 1976); *Clean Air Act Amendments of 1976*, Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 94-1175 at 83-116 (May 15, 1976).

⁵⁹ See pp. [14a-15a] *supra*.

and we believe EPA has acted reasonably in permitting each state, in its informed discretion, to develop a workable definition of significant deterioration.

I. Are the regulations unworkable because present modeling techniques are inadequate to predict precisely how a new source will affect the ambient air?

Some petitioners⁶⁰ have objected that present computer modeling technology is inadequate to predict with precision what effect a proposed new source will have on the ambient air, and therefore on the allowable increment for a given region. EPA does not dispute the point as to the accuracy of existing techniques, but does argue that present diffusion modeling techniques, "while not corresponding to actual conditions in the ambient air, do provide a consistent and reproducible guide which can be used in comparing the relative impact of a source." 39 Fed. Reg. 31003 (August 27, 1974). So long as the method of measurement is consistent, it may be used as a reliable benchmark of the relative impact of different sources; EPA argues that it therefore is unnecessary to be able to guarantee with precision what effect a source will have.

We have no basis on which to question EPA's judgment as to its predictive techniques. Any consistent method of prediction can be adjusted in light of actual experience, and a state therefore may adjust its guidelines for future development on the basis of changes in the measured pollution levels over time. We cannot hold at this time, therefore, that lack of precision alone is a substantial objection to the methods which may be used to estimate the impact of a proposed source on actual levels of pollution.

⁶⁰ See, e.g., *br. of American Petroleum Institute et al.*, in No. 75-1665 at 38.

J. Did EPA violate the Clean Air Act

- (1) by not permitting submission of revised plans before promulgating regulations, or
- (2) by not holding hearings in each state before promulgating the regulations?

The Administrator is required to prepare and publish his own implementation plan, or portion thereof, for a state if (a) the state fails to submit a plan as to any national standard, (b) the plan is not in accordance with the requirements of Section 110 of the Act, or (c) the state fails, within 60 days, to revise its plan pursuant to Section 110(a)(2)(H), which requires that implementation plans provide for revisions (i) to take account of changes in technology or (ii) if the Administrator determines that the plan is inadequate to achieve the primary or secondary standards. Section 110(c)(1), 42 U.S.C. § 1857c-5(c)(1) (Supp. IV 1974). Subsection (c)(1) also contains a hearing requirement; if a state did not hold a public hearing with respect to the plan or revision being promulgated, the Administrator must provide a hearing within the state. The Administrator is to promulgate his regulations within six months, unless within that time the state has adopted and submitted an implementation plan which is in accord with the requirements of Section 110. *Id.*

It is contended that the instant regulations, which amended the implementation plans of all states,⁶¹ constituted a "revision" under Section 110(a)(2)(H). Under Section 110(c)(1)(C) the Administrator may promulgate new regulations only if a state fails, after 60 days, to submit the required (a)(2)(H) revision. Further, if the regulations are considered "revisions," it is claimed, the Administrator was required by Section 110(c)(1) to hold a hearing in each state before promulgating the regulations.

⁶¹ See note 9 *supra*.

The original order of the District Court required that the "Administrator * * * prepare and publish proposed regulations, pursuant to 42 U.S.C. § 1857c-5(c), as to any state plan which he finds, on the basis of his review, either permits the significant deterioration of existing air quality in any portion of any state or fails to take the measures necessary to prevent such significant deterioration. Such regulations shall be promulgated within six months of this order." *Sierra Club v. Ruckelshaus*, Civil Action No. 1031-72 (D. D.C. May 30, 1972). That order—which was affirmed by this court and the Supreme Court—clearly did not contemplate that a hearing be held in each state prior to promulgation of regulations, nor did it require that the states be given a prior opportunity to revise their plans. We reaffirm the order in both respects.

All states had held public hearings on their proposed implementation plans before the District Court order was entered.⁶² After disapproving all state plans insofar as they failed to prevent significant deterioration,⁶³ the Administrator held five regional hearings in Washington, Atlanta, Dallas, Denver, and San Francisco on proposed regulations,⁶⁴ and solicited written comments.⁶⁵ We believe that procedure was sufficient in the circumstances presented. Unfortunately, the requirement of prevention of significant deterioration does not fit neatly into the statutory scheme, as it is not expressly included in Section 110 of the Act. The Administrator's disapproval of all plans pursuant to the District Court order, and the subsequent promulgation

⁶² In its initial approval and disapproval of state plans, published May 31, 1972 (37 Fed. Reg. 10842), EPA noted that all states had held hearings and had submitted implementation plans.

⁶³ 37 Fed. Reg. 23836 (Nov. 9, 1972).

⁶⁴ See 39 Fed. Reg. 31000 (Aug. 27, 1974).

⁶⁵ *Id.*

of regulations, were required by Section 101 of the Act and by the legislative history, but were not within the defined processes of Section 110(c). Implementation of the District Court order required an exercise of discretion by the Administrator, and we find that he acted well within that discretion by concluding that only regional hearings were necessary to supplement the hearings which had already been held in all states.

In making this decision we wish to emphasize, first, that petitioners have not alleged with any specificity how they were harmed by the lack of individual state hearings. We are presented only with a generalized statutory claim,⁶⁶ which apparently never was raised before the Agency. Second, it should be remembered that the states arguably have been denied no rights by promulgation of the nondegradation regulations. They remain free, after public hearing, to develop their own regulatory scheme to supplant that promulgated by EPA, so long as the substitute prevents significant deterioration of air quality.⁶⁷ We cannot conclude, then, that the regulations are defective on procedural grounds.

⁶⁶ *Cf. American Airlines, Inc. v. CAB*, 123 U.S.App.D.C. 310, 318-319, 359 F.2d 624, 632-633, *cert denied*, 385 U.S. 843 (1966):

[T]here is no basis on the present record for concluding that additional procedures were requisite for fair hearing. We might view the case differently if we were not confronted solely with a broad conceptual demand for an adjudicatory-type proceeding, which is at least consistent with, though we do not say it is attributable to, a desire for protracted delay. Nowhere in the record is there any specific proffer by petitioners as to the subjects they believed required oral hearings, what kind of facts they proposed to adduce, and by what witnesses, etc. * * *

See also *United States v. L. A. Trucker Lines, Inc.*, 344 U.S. 33 (1952).

⁶⁷ See pp. [14a-15a] *supra*.

K. By providing for reclassification of federal and Indian lands independent of state action, do the regulations abrogate authority granted to the states by the Clean Air Act?

Federal land managers and Indian governing bodies are authorized to propose redesignation of their lands, after consultation with officials of other affected areas and compliance with procedural and hearing requirements. 40 C.F.R. § 52.21(c)(3) (1975).⁶⁸ The industrial petitioners and the petitioning state governments object that this authority violates the delegation to the states of authority over air quality within their boundaries in Section 101(a)(3), 42 U.S.C. § 1857(a)(3),⁶⁹ and Section 107(a), 42 U.S.C. § 1857c-2(a),⁷⁰ that it contradicts the submission of federal facilities to state regulation in Section 118, 42 U.S.C. § 1857f,⁷¹ and that the authority to redesignate gives these

⁶⁸ See pp. [11a-12a] *supra*.

⁶⁹ 42 U.S.C. § 1857(a)(3) (1970):

(a) The Congress finds—

• • • • •

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments[.]

⁷⁰ 42 U.S.C. § 1857c-2(a) (1970):

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

⁷¹ 42 U.S.C. § 1857f (1970):

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal,

lands tremendous practical power over neighboring areas which might be hindered in their development because of designation of federal or Indian lands as Class I areas.⁷²

EPA has responded that federal land managers and Indian governing bodies have an important legal interest in protecting the air quality of their lands, that redesignation may not be proposed without consultation with officials of the affected states,⁷³ and that the Administrator may dis-

State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so • • • •

• • •

⁷² See 39 Fed. Reg. 42512 (Dec. 5, 1974):

Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State. Therefore, wherever a Class I area adjoins a Class II or III area, the potential growth restrictions, especially for power plant development, extends [*sic*] well beyond the Class I boundaries into the adjacent area. A similar situation exists, to a greater or lesser degree, wherever areas of different classification adjoin each other. Therefore, the area with the less restrictive classification should include an additional area at the periphery where it is clearly recognized that development will be somewhat restricted due to the adjacent "cleaner" area. As a result, a Class I redesignation could be fairly limited in size, yet the adjoining Class II or Class III areas would need to cover a substantial area in order to fully utilize the Class II or III increment. Again, it should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment.

⁷³ 40 C.F.R. § 52.21(c)(3)(iv), (v) (1975).

approve redesignation if arbitrary and capricious disregard of the interests of other affected areas is demonstrated.⁷⁴ With regard to submission of federal facilities to state regulation, EPA notes that federal lands may be redesignated only to a more restrictive classification than that applicable to the entire state,⁷⁵ and thus cannot contribute to unwanted deterioration of air quality.

We pretermitt this question, as we find that the issue is not yet ripe for review.⁷⁶ No federal or Indian land has yet

⁷⁴ 40 C.F.R. § 52.21(c)(3)(vi)(b), (c) (1975).

⁷⁵ 40 C.F.R. § 52.21(c)(3)(iv) (1975).

⁷⁶ See *Toilet Goods Ass'n Inc. v. Gardner*, 387 U.S. 158 (1967), in which cosmetic manufacturers had brought a pre-enforcement action to challenge the authority of the Commissioner of Food and Drugs to issue regulations under the Color Additive Amendments to the Federal Food, Drug, as Cosmetic Act. The regulation at issue authorized the Commissioner to suspend certification service to any person who denied the FDA free access to manufacturing information. Although the issue was purely legal, the Court found that, as framed, it was not appropriate for judicial resolution:

The regulation serves notice only that the Commissioner *may* under certain circumstances order inspection of certain facilities and data, and that further certification of additives *may* be refused to those who decline to permit a duly authorized inspection until they have complied in that regard. At this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order. The statutory authority asserted for the regulation is the power to promulgate regulations "for the efficient enforcement" of the Act, § 701(a). Whether the regulation is justified thus depends not only, as petitioners appear to suggest, on whether Congress refused to include a specific section of the Act authorizing such inspections, although this factor is sure to be a highly relevant one, but also on whether the statutory scheme as a whole justified promulgation of the regulation. * * * This will depend not merely on an inquiry into statutory purpose, but concurrently on an understanding of what types of enforcement problems are encountered by the FDA, the need for various sorts of supervision in order to

been redesignated, and to that extent we cannot be certain how a conflict may evolve. If the Administrator were to approve, as replacements for these regulations, individual state plans which did not include the powers granted to federal land managers and Indian governing bodies, the problems foreseen by petitioners might never arise.

We note that reservation of power to federal land managers and Indian governing bodies should have no effect on present conduct; there appears to be no reason why economic development of any area should be hindered by the possibility that a nearby area may be redesignated in the future to a more restrictive classification. We therefore do not foresee any irreparable injury which may arise from deferral of this question until it arises in a more concrete context.

L. Are the regulations constitutional?

We find the arguments challenging the constitutionality of the nondeterioration regulations to be insubstantial. Regulation of air pollution clearly is within the power of the federal government under the commerce clause,⁷⁷ and we can see no basis on which to distinguish deterioration of air cleaner than national standards from pollution in other

effectuate the goals of the Act, and the safeguards devised to protect legitimate trade secrets * * *. We believe that judicial appraisal of these factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here.

387 U.S. at 163-164 (emphasis in original).

⁷⁷ See *District of Columbia v. Train*, 172 U.S.App.D.C. 311, 328, 521 F.2d 971, 988 (1975); *Pennsylvania v. EPA*, 500 F.2d 246, 259 (3d Cir. 1974); *South Terminal Corp. v. EPA*, 504 F.2d 646, 677 (1st Cir. 1974).

contexts.⁷⁸ Nor do we agree that the regulations bear no rational relationship to protection of public health and welfare and therefore violate the due process clause of the Fifth Amendment. There is a rational relationship between air quality deterioration and the public health and welfare,⁷⁹ and there is a proper legislative purpose⁸⁰ in prevention of significant deterioration of air quality. Neither can the regulations be construed as an unconstitutional "taking" under the Fifth Amendment, any more than existing emission control regulations represent such a "taking."⁸¹ The use of private land certainly is limited but the

⁷⁸ Indeed, the vigorous objections that have been mounted against redesignation of federal lands or Indian lands are based on recognition that a pollution source can have air quality effects over a large area.

⁷⁹ See note 58 *supra*.

⁸⁰ See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-259 (1964), in which the Court held the Civil Rights Act of 1964 to be a valid exercise of congressional power under the commerce clause, and found the Act not barred by the Fifth Amendment:

Nor does the Act deprive appellant of liberty or property under the Fifth Amendment. The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. * * *

See also *Nebbia v. New York*, 291 U.S. 502, 537 (1934) (Fourteenth Amendment).

⁸¹ See *South Terminal Corp. v. EPA*, 504 F.2d 646, 678 (1st Cir. 1974), in which the court upheld a transportation control plan which mandated a 40% reduction in available off-street parking spaces:

[T]he Government has not taken title to the spaces, and the decision about alternative uses of the space has been left to the owner. The takings clause is ordinarily not offended by regula-

limitation is not so extreme as to represent an appropriation of the land.

The Tenth Amendment is not implicated either by infringement on the reserved powers of the states, *cf. National League of Cities v. Usery*, — U.S. —, 44 U.S. L. WEEK 4974 (June 24, 1976), or by any requirement of affirmative action, as in *District of Columbia v. Train*, 172 U.S.App.D.C. 311, 521 F.2d 971 (1975). The states retain broad discretion under the regulations to control the use of their land and the scope of their economic development, and are required to take no affirmative action. Preconstruction review under the regulations is conducted by the Administrator unless a state requests that responsibility be delegated to it. 40 C.F.R. § 52.21(d), (f) (1975).

Last, we find no merit to the argument that the congressional delegation of authority to EPA is unconstitutionally vague. There is substantial basis for the instant regulations in both the Clean Air Act and its legislative history, and we find the regulations to be a reasonable means of implementing the congressional intent.⁸² See *South Terminal Corp. v. EPA*, 504 F.2d 646, 676-677 (1st Cir. 1974).

tion of uses, even though the regulation may severely or even drastically affect the value of the land or real property. If the highest-valued use of the property is forbidden by regulations of general applicability, no taking has occurred so long as other lower-valued, reasonable uses are left to the property's owner.

* * *

⁸² In *Lichter v. United States*, 334 U.S. 742, 785 (1947), the Court upheld a congressional grant of authority to the Secretary of War, the Secretary of the Navy, and the Chairman of the Maritime Commission to renegotiate contracts and to recover "excessive profits." The Court applied the following reasoning to the claim that the term "excessive profits" was unconstitutionally vague:

It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to

[continued]

VI. CONCLUSION

We find no ground on which to disturb the regulations under review, and we therefore affirm the EPA "Prevention of Significant Air Quality Deterioration" regulations.⁸³ Our review of *Sierra Club v. Ruckelshaus* and subsequent events has revealed no substantial reason for rejection of that decision, and we hold that the nondeterioration regulations promulgated pursuant to that decision are both rational and in accordance with law.

Affirmed.

Circuit Judge WILKEY concurs in the result only.

infinitely variable conditions constitute the essence of the program. "If Congress shall lay down by legislative act an intelligible principle . . . such legislative action is not a forbidden delegation of legislative power." *Hampton Co. v. United States*, 276 U.S. 394, 409. Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied. "They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 104. • • •

⁸³ As noted above, *see pp.* [45a-48a], we do not decide the question whether reclassification of federal and Indian lands independent of state action may be unlawful.

[18986]*

[Federal Register, Vol. 38, No. 135—Monday, July 16, 1973]

ENVIRONMENTAL PROTECTION AGENCY**

[40 CFR Part 52]

APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

Prevention of Significant Air Quality Deterioration

Notice is hereby given that the Administrator of the Environmental Protection Agency (EPA) intends to issue regulations setting up a mechanism for preventing significant deterioration of air quality in areas where air pollution levels currently are below the national ambient air quality standards (40 CFR Part 50). These regulations would be issued under the Clean Air Act and would prescribe steps to be taken by the States. This notice sets forth four proposed plans reflecting various approaches to defining and preventing significant deterioration. It is the Administrator's intention not only to receive written comments on these proposals but also to hold public hearings in various places in order to provide the greatest possible opportunity for public involvement in this rule-making. Certain questions on which public comment is specifically invited are identified in the concluding section of this preface.

Publication of this notice is related to a suit filed May 24, 1972, in which the Sierra Club and other groups sought a declaratory judgment and injunction requiring the Admin-

* Bracketed numbers represent the page in the *Federal Register* upon which material following such a number can be found.

** The "significant deterioration" regulations, as reprinted on pp. 91a to 291a herein, appeared on pp. 1-36, 688-98 of the joint appendix filed in the consolidated cases below.

istrator to disapprove all State implementation plans which did not contain procedures for preventing significant deterioration in any portion of any State where air quality is superior to national standards. On May 30, 1972, the District Court for the District of Columbia granted the plaintiffs' motion for a preliminary injunction and issued a preliminary injunction requiring the Administrator, within four months thereafter, to review all State plans and "disapprove any portion of a State plan which fails to effectively prevent significant deterioration of existing air quality." The preliminary injunction also required the Administrator to promulgate regulations "as to any State plan which he finds, on the basis of his review, either permits the significant deterioration of existing air quality in any portion of any State or fails to take the measures necessary to prevent such significant deterioration." On November 1, 1972, the decision of the District Court was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit on the basis of an opinion filed by the District Court on June 2, 1972. Subsequently, the U.S. Supreme Court stayed the effect of the District Court's decision pending its consideration and disposition of the case on application for a writ of certiorari. On June 11, 1973, the Supreme Court, by an equally divided court, affirmed the judgment of the Court of Appeals; no opinion was issued.

Each State plan has been reviewed in accordance with the preliminary injunction issued by the District Court. Although many State plans included regulations which have the potential for resulting in the attainment of air quality better than that required by the national standards, and although some State plans contained general policy statements indicating an intent to prevent or minimize deterioration of air quality, none was found to contain explicit and enforceable regulations for implementing such a policy. Accordingly, all State plans were disapproved by the Administrator on November 9, 1972 (37 FR 23836), in-

sofar as they failed to provide for the prevention of significant deterioration. This disapproval did not affect the status of any previously or subsequently approved regulations designed to provide for the attainment and maintenance of national ambient air quality standards. Furthermore, in the absence of Federal regulations prescribing requirements for prevention of significant deterioration the Administrator's disapproval was necessarily based on a generalized assessment of the State plans. To the extent that any State plan is determined to meet any of the requirements ultimately established as a result of this rule-making proceeding, the Administrator's disapproval will be appropriately modified.

In EPA's view, there has been no definitive judicial resolution of the issue whether the Clean Air Act requires prevention of significant deterioration of air quality. When the issue was presented to the Supreme Court, the Court was equally divided. The Court's action had the effect of permitting to stand the judgment of the Court of Appeals for the District of Columbia Circuit, which was entered in the procedural context of the issuance of a preliminary injunction.

In the absence of a definitive judicial decision on the issue, the Administrator adheres to the view that Section 110 of the Clean Air Act requires EPA to approve State implementation plans that will attain and maintain the national ambient air quality standards, and that the Act does not require EPA or the States to prevent significant deterioration of air quality. The proposed alternative regulations set forth herein would establish a mechanism for preventing significant deterioration pursuant to the preliminary injunction issued by the District Court.

PUBLIC POLICY ISSUE

The question raised by the Sierra Club suit was a legal issue, i.e., interpretation of the language and legislative

history of the Clean Air Act. Thus, the courts were asked to determine that the Act requires the Administrator to ensure that State implementation plans will not permit significant deterioration of air quality. What the courts were not asked to determine is what constitutes significant deterioration and exactly how it will be prevented.

A national policy of preventing significant deterioration, however defined and implemented, will have a substantial impact on the nature, extent, and location of future industrial, commercial, and residential development throughout the United States. It could affect the utilization of the Nation's mineral resources, the availability of employment and housing in many areas, and the costs of producing and transporting electricity and manufactured goods. Without implying any judgment as to the general acceptability of any of the effects of a "no significant deterioration" policy, the Administrator believes that they are potentially so far-reaching that the question of how such a policy should be defined and implemented cannot properly be addressed, much less decided, on narrow legal grounds. Rather, it is a question that must be discussed, debated, and decided as a public policy issue, with full consideration of its economic and social implications. To approach the question in any other manner would be much too simplistic. There is, perhaps, no other environmental issue that imposes upon the Administrator, and the public, a greater obligation to formulate and objectively evaluate a range of possible solutions. The usual rulemaking procedure of putting forth a single proposal clearly is inadequate in this case. Accordingly, this notice sets forth four alternative sets of proposed regulations based upon different philosophies and administrative approaches to defining and preventing significant deterioration.

CURRENT CONSTRAINTS ON DETERIORATION

It is important to recognize that many State plans, as well as certain rule making actions already completed

under provisions of the Clean Air Act, will have the effect of attaining or maintaining air quality significantly better than the national secondary standards in many places, and that these actions will have the effect of generally improving air quality nationwide. The following paragraphs summarize the more significant of these actions, and there is no intent that the alternatives proposed herein should in any way mitigate the impact of these actions.

1. The Administrator has promulgated (36 FR 8186) national primary and secondary ambient air quality standards. In accordance with the Act, the primary standards were set at a level that provides an adequate margin of safety for protection of the public health, and secondary standards were set at a level that protects the public welfare from any known or anticipated adverse effects. All States have submitted implementation plans to attain and maintain these standards. In many areas of the country, air quality was not sufficient to meet these standards and, hence, in these areas, the State plans will ensure that deterioration cannot occur because the regulations require specific improvements in air quality.

2. Emission control actions to be taken by the States, in accordance with their plans to implement the National Ambient Air Quality Standards in heavily polluted areas, will reduce air pollution concentrations in the periphery of such [18987] areas. For example, the annual average sulfur dioxide concentration in Mercer County, New Jersey, is expected to drop from about 25 micrograms per cubic meter to about 10 micrograms per cubic meter (as compared to the national secondary standard of 60 micrograms) as a result of emission reductions in and around Philadelphia.

3. Emissions reductions to be achieved under State plans in major urban and industrial centers will significantly affect total national emissions and thereby lower the background pollutant concentrations in rural areas. Thus a 25 percent reduction in the background concentra-

tion of particulate matter (from about 40 micrograms per cubic meter to about 30 micrograms) in rural areas in the Northeast is anticipated.

4. Emission limitations and other regulations, including restrictions on the sulfur content of fossil fuels as prescribed by many State plans, go beyond what is minimally necessary for attainment of the national standards. In many instances, emission control regulations necessary for attainment of national standards in the most polluted area(s) of a State have been applied statewide. For sulfur dioxide, this has occurred in 33 States. Although implementation of these regulations may be deferred in some clean areas in order to make available low sulfur fuels for use in heavily polluted areas, these regulations will eventually result in further improvement in air quality in many areas where the secondary standards were not exceeded.

5. Federal emission standards for new motor vehicles will result in a steady decrease in motor vehicle emissions in all parts of the Nation through the 1970's and well into the 1980's, as new automobiles equipped to meet these emission standards replace older models which were subject to less restrictive emission standards or none at all. For example, 1974 model automobiles will have emission reductions (per mile) of approximately 80% for carbon monoxide, 70% for hydrocarbons, and 35% for oxides of nitrogen, as compared to vehicles sold prior to 1969. This trend is a result of the Federal emission standards already in effect; it will be accelerated by the even more stringent emission standards due to take effect in the 1975 and 1976 model years.

6. Control of sulfur dioxide, nitrogen oxides, and hydrocarbon emissions to meet national ambient air quality standards and/or Federal emission standards for new stationary sources and motor vehicles can be expected to inhibit atmospheric reactions involving these pollutants and

thereby reduce ambient air concentrations of particulate matter such as sulfates, nitrates, and organics. Current State implementation plans generally do not consider this secondary reduction of particulate levels.

It can be seen that there are very strong regulatory measures in existence to prevent any deterioration of air quality in regions where the national standards are currently exceeded. Strong regulatory measures also exist to insure that air quality in currently clean areas cannot deteriorate sufficiently to subject the public health or welfare to any currently quantifiable adverse effects. Although the effect of these regulations is to mitigate any deterioration in most sections of the country, the alternatives presented herein are intended to prevent, in accordance with the District Court's preliminary injunction, any significant deterioration of air quality in any portion of any State.

CONCEPTUAL ISSUES

Section 109 of the Clean Air Act requires the Administrator to establish national primary ambient air quality standards "to protect the public health" and national secondary ambient air quality standards, "to protect the public welfare from any known or anticipated adverse effects," including, as specified by section 302(h), "effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." Such national standards must be based on air quality criteria which, under section 108, must "reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health and welfare which may be expected from the presence [of air pollutants] in the ambient air, in varying quantities." Thus, standard-setting under section 109 is necessarily limited to demonstrable or predictable adverse

effects which can be quantitatively related to pollutant concentrations in the ambient air.

The basis for preventing significant deterioration therefore lies in a desire to protect aesthetic, scenic, and recreational values, particularly in rural areas, and in concern that some air pollutants may have adverse effects that have not been documented in such a way as to permit their consideration in the formulation of national ambient air quality standards. Pending the development of adequate scientific data on the kind and extent of adverse effects of air pollutant levels below the secondary standards, significant deterioration must necessarily be defined without a direct quantitative relationship to specific adverse effects on public health and welfare. It should be emphasized that defining significant deterioration in this way does not imply a judgment by EPA on the question of whether it is sound public policy to define "deterioration" as any increment above existing air pollution levels and to attempt to define "significant" deterioration in the absence of documentation on the adverse effects thereof. Furthermore, it is possible, indeed probable, that even when there are additional data, it will be evident that there are levels below which some of the pollutants covered by national standards do not have effects that can be considered adverse to public health and welfare.

To the extent that the Act provides any basis for defining significant deterioration, it does so only in section 101(b)(1), which declares that one of the purposes of the Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population". Additional guidance is available from the legislative history; specifically, the Report of the Senate Committee on Public Works (Report No. 91-1196, dated September 17, 1970) contained the following statement:

In areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality.

Though the Report also suggested that it might be possible to prevent all deterioration, it is apparent that the measures necessary for that purpose would bring growth and development virtually to a standstill in many areas and therefore are incompatible with protecting the "productive capacity" of the Nation's population.

Clearly, it is not within the province of EPA, under either the Clean Air Act or any other statute, to impose limitations on the Nation's growth. Neither the Sierra Club nor any of the States or organizations that filed amicus curiae briefs with the Supreme Court in support of the Sierra Club's position argued that the District Court's preliminary injunction means that EPA must limit economic growth, as such, in order to prevent significant deterioration of air quality. To the contrary, it was agreed that growth could and would continue, albeit with the restrictions necessary to prevent significant deterioration.

The Sierra Club, for example, made the following statement:

The development of rural areas will not be prevented by a prohibition against significant deterioration of air quality. Such a prohibition on its face does not prevent all increases in pollution. If the best available technological developments are utilized and if numerous pollution producing sources are not concentrated in one place, most industry can enter clean areas without causing significant deterioration. (p. 94)

And the State of California made the following statements:

Prevention of significant deterioration of air quality does not foreclose the construction in clean air basins and partially polluted air basins of well-planned and well-disbursed fossil fuel power plants and other polluting industries which utilize, on a continuing basis, the best available technology. 'No significant deterioration' simply means that certain large and inadequately controlled pollution sources will not be permitted. (pp. 1-2) Of course, economic and social factors may well require some degradation of air quality in certain areas. But this case does not involve any question of prohibiting growth or prohibiting *any* deterioration of air quality. It is not a 'non-degradation' case. (p. 28)

[18988] There is, therefore, a consensus that the definition of significant deterioration is intended to represent some level above zero deterioration. An upper bound can also be established on the definition of significant deterioration by recognizing that existing regulations prevent deterioration to levels in excess of the secondary air quality standards.

Hence, any quantitative definition of significant deterioration must fall between the levels of zero deterioration and deterioration up to the secondary standards. Any quantitative definition within this range must be essentially subjective, because, within this range, data are not available with which to quantify any adverse impact on either public health or welfare.

Nationally, the steady deterioration in air quality over the last several decades has already been reversed by existing regulations, and air quality generally has begun to improve in the last few years. Further, this improvement will continue for the foreseeable future. The following table summarizes the expected reductions in total na-

tional emissions by 1980. The percentages shown are based on the national emissions of 1970, and include (i.e. "absorb") the growth in sources anticipated for the 1970-1980 period.

Pollutant:	Percent Reduction in Emissions
Particulates	40
Sulfur Dioxide	70
Carbon Monoxide	80
Oxides of Nitrogen	40
Hydrocarbons	60

However, even though the nationwide trend in emissions and air quality is favorable, in many local areas which are now quite clean there is the possibility that deterioration could occur. This is because trends in the nationwide averages are predominately influenced by severe emission controls being applied in the large urban areas to attain and maintain the national ambient air quality standards. These controls could drive major polluters into the semi-urban and rural areas, thereby degrading air quality in those areas to a degree that could approach (but not exceed) the secondary standards. Additionally, the growth patterns throughout the country are continually changing, and the normal economic expansion can be expected to lead to increased emissions in some local areas which previously were undeveloped. In some of these areas, the public may feel that the improved economic conditions do not justify the resulting environmental deterioration, even though that deterioration is insufficient to cause a quantifiable adverse impact on either the health or welfare of the population.

However, the future nationwide reduction in emissions, and hence in pollutant concentrations, will be significant. Although much of this reduction is being accomplished in highly industrialized urban areas in order to attain and

maintain the national standards, a considerable reduction is also being accomplished in semi-urban areas already well below the standards. Depending upon the plan selected with which to prevent significant deterioration, much of this latter reduction could be used to accommodate future growth without significant deterioration. Further improvements in emission control technology would allow additional growth without causing significant deterioration. The proposed plans would serve to stimulate such improvements.

Nevertheless, it is not possible to rely solely on improved emission control technology to offset the increased emissions attendant to population and economic expansion and redistribution. Many areas of the country have virtually no man-made emissions. To establish a policy that new emissions can only be introduced to the extent that current emissions are reduced would forever relegate these areas to an essentially undeveloped status. This feature would, in turn, require that new pollution sources be located only in the semi-urban and urban areas of the country in which improved control technology would have the greatest impact. This would force the majority of the new emissions into these areas in which the majority of the Nation's population resides.

The relative significance of air quality versus economic growth may be a variable dependent upon regional conditions. For example, relatively minor deterioration of the aesthetic quality of the air may be very significant in a recreational area in which great pride (and economic development) is derived from the "clean air." Conversely, in areas with severe unemployment and little recreational value, the same level of deterioration might very well be considered "insignificant" in comparison to the favorable impact of new industrial growth with resultant employment and other economic opportunities. Accordingly, the definition of what constitutes significant deterioration must

be accomplished in a manner to minimize the imposition of inequitable regulations on different segments of the Nation.

Many States have expressed the desire that federal regulations be promulgated in a manner which would permit all States to prevent significant deterioration without placing any individual states in unfairly advantageous or disadvantageous positions for attracting new industry. It is therefore desirable to insure that industry is provided with no incentive to "shop" for areas in which efforts to prevent significant deterioration are deliberately relaxed. Because the competition for new industry is extremely keen among many States, this would require that the philosophy for preventing significant deterioration be enforced uniformly throughout the Nation, even though the definition of what constitutes significant deterioration could include regional variations.

The problem of preventing significant deterioration can be somewhat simplistically, stated as that of reducing emissions to the lowest practicable level, and then distributing those residual emissions in a manner in which they do the least harm. The four alternative plans discussed herein would accomplish this at requiring application of best available control technology to all new or significantly modified major sources regardless of any expected level of deterioration. In addition, each plan is based upon a different type of decision criterion which would be used to determine whether a proposed new or significantly modified source would be permitted to commence construction in any specific location. The four decision criteria would be based upon (1) definition of "significant deterioration" as a constant increment in air quality applicable nationwide, (2) definition of "significant deterioration" as the greater of either a percentage increase in emissions or an emission increment, (3) definition of "significant deterioration" on a case-by-case basis by the public in the

local area affected, and (4) definition of "significant deterioration" as one of two air quality increments depending upon land use projections by the State. Each of these plans are discussed in subsequent sections. However, all four plans contain several common features which are worthy of consolidated discussion.

POLLUTANTS SUBJECT TO DETERIORATION CONTROL

Each of the alternative proposals set forth below would require, as a minimum, that best available control technology be applied to certain categories of new sources of sulfur dioxide, particulate matter, carbon monoxide, hydrocarbons, and nitrogen oxides. Thus, this requirement would apply directly or, in the case of photochemical oxidants, indirectly to all pollutants covered by national ambient air quality standards.

The second basic requirement is a review to determine that individual new sources within the specified source categories will not cause significant deterioration. This requirement would be applied only to particulate matter and sulfur dioxide. The other pollutants covered by national standards are related primarily or substantially to motor vehicle emissions. As a result of the application of EPA's emissions standards for new motor vehicles, total motor vehicle emissions are decreasing and will continue decreasing well into the future. Accordingly, the purpose of preventing significant deterioration related to carbon monoxide, hydrocarbons, nitrogen oxides, and photochemical oxidants is in the Administrator's judgment, adequately served by the proposed additional requirement for applying best available technology to new stationary sources.

Furthermore, the formation of photochemical oxidants from hydrocarbons and nitrogen oxides and the formation of nitrogen dioxide from nitric oxides involve complex photochemical processes which are time-dependent and related to atmospheric conditions and the interaction of

emissions from a variety of sources. It is not possible to relate a specific isolated point source of hydrocarbons or nitrogen oxides to a specific [18989] ambient concentration of photochemical oxidants or nitrogen dioxide because the techniques and assumptions that permit correlation of emissions with ambient air quality in multiple-source areas generally are not valid for application to point sources in relatively clean areas.

SOURCES SUBJECT TO REVIEW

All the proposals set forth below would require preconstruction review of certain types of stationary sources. The proposed preconstruction review procedures are similar to those already required by State implementation plans. These procedures require that source owners or operators submit data to the State and apply for approval to construct, and that the State approves or disapproves the request based on specific criteria. In relation to air quality deterioration, the criteria for this "yes or no" decision are inherent in each plan proposed herein, and are described in the section on each plan.

The initial list of sources proposed for this specific review in each plan represents the Administrator's best judgment as to which sources, in and of themselves, have the potential for causing "significant deterioration" as defined by the four alternative plans. The proposed regulations contain sixteen source categories which currently account for approximately 30 percent of the particulate matter and 75 percent of the sulfur dioxide emitted into the atmosphere each year nationwide, and account for essentially all of these pollutants emitted in clean areas. The regulations also require that any other sources emitting more than 4000 tons of sulfur dioxide or particulate matter annually be subjected to this review.

It is important to note that under the three alternative plans which place a ceiling on pollutant concentrations or

emissions from an area, this initial list of sources will be subject to revision as an area approaches its ceiling.

The list of source categories has been restricted in the proposed regulations because it is considered unwise and unnecessary to divert available resources from other air pollution control activities in order to review new sources which do not have the potential to violate the proposed decision-making criteria. It may eventually be necessary to establish a mechanism for making advance assessments of the aggregate air quality impact of smaller sources. Such a mechanism is likely to involve projections of future growth and estimates of air quality impact, similar to those required by the recently promulgated amendments (38 FR 15834, dated June 18, 1973) to new source review requirements applicable to State implementation plans.

BEST AVAILABLE CONTROL TECHNOLOGY

Each of the plans proposed herein would require, as a minimum, application of "best available control technology" (BACT) to specified categories of new sources. The proposed regulations specify that control systems adequate to comply with new source performance standards (NSPS) promulgated under section 111 of the Clean Air Act generally will be considered BACT (with the exception noted below). The proposed regulations also specify that until such time as new source performance standards (NSPS) are promulgated, BACT for a particular source will be determined by considering: reasonably available control technology [as defined in Appendix B to the Administrator's regulations for the preparation, adoption, and submittal of state implementation plans (40 CFR Part 51)]; the processes, fuels, and raw materials to be employed by an affected source; the engineering aspects of the application of various types of control techniques, and the cost of employing the available control techniques, including hardware and alternative processes, fuels, and

raw materials. However, all specified sources are expected to be covered by NSPS within 18 to 24 months and, because NSPS generally represent the lowest practicable level of emissions, the attainment of NSPS will generally be compatible with application of BACT.

The proposed exception to this equivalency of NSPS to BACT exists with respect to sulfur dioxide emissions from fossil fuel-fired steam electric plants. The levels of emissions from these plants have an extremely wide range due to the varying amounts of sulfur in fuels available in different parts of the country. Current NSPS are set at a level which requires use of a control system on plants burning high sulfur coal. However, in some regions, coal with sulfur content low enough to meet the NSPS is readily available and would be used even in the absence of emission limitations. In these situations, use of the low sulfur regional coal with no additional efforts to control sulfur dioxide emissions would not automatically constitute application of BACT. This use of NSPS as a maximum emission limitation, with the possibility of requiring additional control on a case-by-case basis, is being proposed because the NSPS are designed for uniform application nationwide, whereas significant deterioration is essentially a local or regional issue. Therefore, each of the proposed regulations requires that a case-by-case analysis of fossil fuel-fired electric plants be conducted to determine if emissions can and should be further reduced.

Alternatively, control systems adequate to meet NSPS could be considered BACT in all cases where NSPS exist, including the case of fossil fuel-fired electric generating plants. Since NSPS are required to reflect "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated," they could be considered to represent a sufficient degree

of emission control to prevent significant deterioration "to the maximum extent practicable," in all areas. This alternative definition of BACT is not specifically included in the proposed regulations but since it is arguably consistent with the District Court's preliminary injunction, it is described herein and specifically called to the attention of all interested parties so that there will be an adequate opportunity for public comment thereon.

BASELINE FOR MEASURING DETERIORATION

Most of the plans which have been considered for preventing significant deterioration require that an identifiable level of air quality or emissions be established as a baseline from which to measure deterioration. The three principal alternatives which have been considered are the level existing in 1970 (to correspond to passage of the Clean Air Act), the level existing in 1972 (to correspond to the litigation to which these proposals are related), and the level existing in 1973 (to correspond to these proposed regulations).

The use of 1970 as a nationwide baseline would present several practical problems. Foremost among these is that in the interim between 1970 and the current time, growth patterns have changed sufficiently that, although the nationwide air quality has improved substantially, in some (particularly non-urban) areas the air quality has already deteriorated—in some places to the extent that the deterioration could be considered significant under some alternative plans. The status of sources which have received prior authorization to construct in these areas would become questionable. Yet, it does not appear equitable to withdraw that authorization due to newly promulgated regulations. In many other areas, air quality could have improved so dramatically that use of 1970 as a baseline would render any deterioration regulations virtually meaningless.

In addition, the availability of air quality data from which to measure deterioration represents a severe problem. Generally, air monitoring has been most intensive in heavily polluted areas. There has been only scattered monitoring in relatively clean areas. However, it is in these relatively clean areas that the deterioration issue is most critical, and to effectively apply most deterioration plans it is essential that relatively precise baseline data be available. Even today, the precise air quality or emission levels in many of these areas are unknown, this, problem is compounded if baseline requirements are extended into the past.

However, the use of 1973 as a baseline year is also impractical, because the baseline must be established upon data for an entire year. Since annual data for 1973 could not be made available in sufficient time for initial application of these regulations, the use of 1973 would require that all data be estimated.

For these reasons, those plans discussed herein which require establishment of a baseline air quality or emission level are developed around the measured or estimated data for 1972. This minimizes, but does not eliminate, the problems associated with lack of data. It also tends to minimize many inequities associated with use of prior year baselines. It does, however, retain the problem regarding treatment of new or modified sources which [18990] have already been approved for construction by the appropriate air pollution agency, but whose emissions and impact on air quality would not be included in the 1972 data base. Because it does not appear equitable to withdraw the construction approval from these sources, the 1972 baseline as defined in the proposed regulations consists of the measured or estimated air quality (or emissions) existing in 1972 as modified by the estimated impact of any source approved (prior to date of this proposal) for construction.

The selection of 1972 as the baseline year also introduces potential problems for a number of growth-oriented regions which improved their air quality in the period 1970-1972 to levels substantially superior to the national standards in anticipation of using that full increment to accommodate future economic expansion. The proposed regulations could substantially reduce that flexibility. The use of 1972 also tends to benefit those areas which were comparatively slow to implement emission reductions. These areas may now implement reductions in the future, and use the resulting air quality or emission increment for future economic expansion. Although this feature appears to penalize growth-oriented regions which implemented stringent controls to achieve air quality substantially superior to the national standards, the disadvantages of the alternative baseline concepts appear to be more significant. Hence, in all plans proposed herein requiring a baseline year, the year 1972 is used.

One or, possibly, some combination of the following four alternatives to prevent significant deterioration will be promulgated as Federal regulations to be enforced by the States until such time as each State possesses authority to enforce similar State regulations.

I. AIR QUALITY INCREMENT PLAN

This section discusses a plan to prevent significant deterioration by establishing, for nationwide application, a maximum allowable increment in air quality above the baseline air quality. It is based upon the premise that "significant" deterioration can be defined as a finite increment in air quality, and that the resulting quantitative definition is appropriate for all sections of the country regardless of socio-economic conditions, and regardless of the current level of air quality (so long as national ambient air quality standards or other limitations are not exceeded). In addition to establishing this allowable in-

crement, which is applicable to sulfur dioxide and particulate matter, the plan also incorporates the requirement common to all plans that all new or modified sources employ best available control technology.

Regulations which would implement this plan are proposed as the first set of alternative regulations in this notice. The regulations list the sixteen source categories for which deterioration review must be conducted, and also require the review of additional sources with potential emissions in excess of 4000 tons per year.

The definition of significant deterioration on which this plan is based consists of specific allowable increments to be added to the baseline air quality level. These increments are specified in the proposed regulations as:

For particulate matter:

10 $\mu\text{g}/\text{m}^3$ (annual average)

30 $\mu\text{g}/\text{m}^3$ (24 hour average)

For sulfur dioxide:

15 $\mu\text{g}/\text{m}^3$ (annual average)

100 $\mu\text{g}/\text{m}^3$ (24 hour average)

300 $\mu\text{g}/\text{m}^3$ (3 hour average)

The averaging times have been selected to be compatible with the existing secondary standards for these pollutants, and the times would be revised to be compatible with any revisions to the standards. This use of compatible time periods is necessary to insure maximum availability of baseline data, and also to facilitate incorporation of the deterioration review procedures into the existing new source review procedures.

Although there are no quantitative data to support the choice of any specific increment below the national standards, the increments proposed represent the Administrator's best judgment of increments which would prevent

significant deterioration of currently clean areas, and yet not totally prevent the economic development of selected areas if that development were in the public interest.

If this proposed regulation were implemented, it would limit future development to the level of light industrial and residential complexes, or a very small amount of heavy industry such as stringently controlled power plants. For example, a recently constructed large apartment complex (15,375 units) in New York City is estimated to increase the 3-hour SO_2 concentration by $70 \mu\text{g}/\text{m}^3$. This type of development would be allowed. A single well controlled large (1000-1500 MW) coal fired power plant can be expected to increase 24-hour SO_2 from 50 to $200 \mu\text{g}/\text{m}^3$ depending on terrain conditions, the emission height and the dispersive characteristics of the atmosphere. The lower numbers represent typical values associated with construction in areas of good dispersion and relatively level terrain; a power plant of this type could be constructed to operate within the proposed criteria. The large increases represent plant construction in non-level terrain or areas of limited dispersion capability: If a plant were to locate in these areas a reduction in emissions beyond NSPS would be required. In general, most other types of sources would have a smaller impact on sulfur dioxide concentrations than a coal fired power plant and, if well controlled, could probably be constructed in most areas. However, in most areas if a source such as a power plant were constructed, the influence of emissions from this source would possibly raise the pollutant concentration over a large area (as great at 700 sq. miles) to a level which would be incompatible with any additional significant development.

The examples cited above assume that emission levels would be comparable to New Source Performance Standards. However, if a coal fired power plant used, for example, 80 percent efficient stack gas cleaning in addition to low sulfur (approximately 0.7 percent) coal, the 24-

hour SO_2 increase could be limited to $10\text{-}40 \mu\text{g}/\text{m}^3$, thus permitting construction of several sources. This example further emphasizes that prevention of significant deterioration need not necessarily prevent significant economic development so long as major emphasis is placed on improving emission reduction techniques.

The proposed regulations for this plan would require that all applicable new or modified sources submit comprehensive data to the State describing the source, the type and amount of projected emissions, the type of controls planned, the impact that the new or modified source would have on air quality, and an estimate of the existing air quality in the vicinity of the source. This information would be used by the State, subject to the Administrator's approval, to determine if the source would exceed the allowable air quality or emission limitations and to insure that the source plans to apply best available control technology. Prior to making this determination, the State would be required to provide opportunity for public comment on all information available.

In addition, the proposed regulations require that, unless the State determines that there is already an adequate air quality monitoring network in the vicinity, the source install a minimum of two continuous air quality monitoring instruments, and one meteorological instrument in the areas of expected maximum concentration. This feature would assist in developing adequate air quality information for monitoring of the source's impact, and for analysis of the potential impact of proposed future sources to insure that the deterioration ceiling is not exceeded.

Unfortunately, the type of air quality data needed to accurately establish the baseline air quality is not currently available in many clean areas of the country. It would therefore become necessary to initially estimate this information by use of diffusion modeling and other appropriate techniques.

Despite the problems generated by lack of data in most very clean areas, this alternative has some generally desirable features. The increments proposed would not totally prevent economic development of all currently clean areas, but they would force large sources to employ increasingly effective control techniques, would provide the incentive for strong control technology research and development, would prevent construction in difficult terrain areas such as valleys or mountainous areas with poor dispersion characteristics, and would also prevent clustering of large sources with the potential for high localized pollutant concentrations.

The impact of this alternative on currently developed regions is more difficult to assess. As time progresses, improved control technology will cause significant [18991] improvements in the air quality of currently developed areas and these areas will therefore be capable of absorbing more new development than the currently clean areas. This plan would therefore cause currently clean areas to remain relatively clean, but only at the expense of forcing new sources back into the more highly developed and populated areas.

A basic problem of this plan is the land use implications implied with no provisions to insure that they are in the best interests of the public or compatible with public desires. Inherent in any plan with a single deterioration definition applied nationally is the arbitrarily equal treatment of all equally clean areas. It may not be wise to restrict the development of waste lands to the same degree that a scenic national park is restricted, particularly if that restriction forces additional air quality deterioration on the heavily populated regions of the nation.

II. EMISSION LIMITATION PLAN

This section discusses an alternative plan to indirectly prevent significant deterioration of air quality by prevent-

ing significant increases in emissions. Although the correlation between emissions and air quality is often difficult to establish, control of emissions may result in the same effects as are intended by preventing significant deterioration of air quality. Although the national ambient air quality standards are intended to adequately protect the public health and welfare from adverse effects, there are suspected effects that may be related more closely to total atmospheric loading than to specific ambient concentrations. These effects include visibility reduction; reduction in solar radiation reaching the ground; acidification of rain, lakes, and streams; conversion of sulfurous and nitrogenous emissions into sulfates and nitrates; and increases in "background" concentrations. None of these effects have been quantified to the extent that a precise relationship between pollutant emissions, pollutant concentrations, and the degree of adverse effects can be stated. There is, however, at least a qualitative basis for the prevention of significant increases in the load of pollutants carried by the atmosphere.

Atmospheric loading is poorly indicated by ground level concentration measurement due to the influence of meteorological dispersion and source location. Emission density (regional emissions/regional area) is an excellent indicator of atmospheric loading. Furthermore, emission data are more readily available and easier to acquire than air quality distribution data. Thus, emission density is a relevant and practical measure of, and means of control for, types of ambient air deterioration not presently limited by ambient air quality standards.

The calculation of emission density requires the choice of an area over which emissions are to be averaged. The regulations proposed for this plan specify an Air Quality Control Region (AQCR) as this area. There are several reasons for this choice. The AQCR is an established geographical subdivision for purposes of air quality analysis.

Considerable data are available on this basis. Furthermore, an area of median AQCR size is necessary in order to provide the kind of development flexibility required with currently available technology. If the averaging area is too small, then no large source of source cluster could locate within it without violating the emission ceiling. A larger averaging area allows the location of a few such large sources because the total emission increase can be allocated to a small portion of the land (thus assuring that the remaining area will remain at low emission density).

It is recognized that AQCRs differ in size and that rigid adherence to the AQCR subdivision could lead to inequitable development opportunity; therefore it is anticipated that, if this proposal is promulgated, States would develop procedures to permit subdivision of large AQCRs and aggregation of small ones. This would also permit relatively pollution free portions of Priority I and II AQCRs to be included in the regions covered by this plan during the AQCR size adjustment process. As the proposed regulations are currently written, this plan would apply only to Priority IA and IIIAQCRs.

Given the size of an AQCR or averaging region, the baseline annual emissions of sulfur dioxide and particulate matter can be determined. A ceiling emission rate is then calculated by adding either 20% to the baseline emissions, or by calculating a ceiling based on emission density, whichever is larger. This establishes the emission limits for the region. Implementation of this plan would then consist of insuring that the total annual emissions from the region remained below the established emission ceiling.

The incremental increase is difficult to select due to a deficiency of relevant data and theory on the relationship between emission density, atmospheric loading, and the effects to be limited. The emission density factors included

in the proposed regulations are 10 tons/year/sq. mile for sulfur dioxide and 3 tons/year/sq. mile for particulates. No AQCR with sulfur dioxide emission densities below these has exhibited air quality poorer than secondary national standards. Particulate emission densities display no general correlation of this type. However, most relatively clean areas have man-made particulate emissions below this level. It should be noted, however, that sulfur dioxide emission densities as high as 200 tons/year/sq. mile may be compatible with Priority III status. The poor correlation between emission density and measured air quality is due to the effect of meteorological factors and source location, as mentioned earlier.

Given the size of the region the allowable emission density factor or percentage increase and the baseline emissions, the emission ceiling for each region can be calculated. The resulting ceilings apply to *all* emitters in the region. For practical reasons, only the large sources included in the proposed regulations must be given formal review, but the contributions of new and existing small sources to the total emissions must also be inventoried.

The regulations proposed for this plan would require each new or modified major source to provide information necessary for the determination of the probable emission rate, compliance with BACT, siting analysis under current new source review procedures, and for public information on which to base comments.

This plan would allow each region considerable flexibility on the selection and location of new emitting sources. The amount of new development possible under the emission ceiling depends critically on the degree of emission control applied to both new and existing sources. The ground level air quality at a given point in the region depends on the distribution of sources about that point. It is possible that the development of small residential and commercial sources could be limited because the avail-

able emission increment is used by a few large new emitters. It is also possible that ground level air quality could increase to secondary standards in one or more places due to large new sources or source clusters (although this would insure that air quality in the rest of the region would have no deterioration).

The determination of how emission density is to be distributed in each region would be the State's prerogative, and the Administrator would accept any distribution provided that the emission ceiling and national ambient air quality standards are observed. It is strongly recommended, however, that the allowable regional emissions be distributed in some rational and equitable manner so that the best available ground level air quality is maintained, development is balanced between industry, commerce, and residences, and that the review and approval of the sources specified in this regulation precludes the possibility that a few large sources usurp all of the available air resources of the region.

As an example of how this plan operates, assume that an AQCR of 10,000 square mile area has baseline emissions of 40,000 tons/year of sulfur dioxide. The applicable emission ceiling in this case would be 100,000 tons/year. Assume also that existing sources are expected to reduce emissions from 40,000 to 20,000 tons/year by 1980, and that small source growth is expected to equal 10,000 tons/year. The net available emissions through 1980 would amount to 70,000 tons/year. A coal fired power plant of 1,000 megawatt capacity which meets NSPS will emit about 50,000 tons of sulfur dioxide per year. Such a plant could be located in this AQCR, but it would use a large proportion of the available emission allowance. The State would have to balance its need for electricity against other anticipated emission increases to determine if such a power plant was desirable, [18992] if this type of plant was necessary, or if the emissions from the plant should be

reduced below NSPS by applying lower sulfur coal and/or more efficient stack gas cleaning equipment.

III. LOCAL DEFINITION PLAN

One of the major problems in defining significant deterioration is that the level at which air quality deterioration becomes "significant" is essentially subjective, and is often logically dependent upon a large number of factors which vary from location to location. Accordingly, the proposed regulations supporting this alternative plan would ensure that the rate of deterioration is minimized in all areas and requires State decision-making, with public participation, on the question of whether the deterioration resulting from particular sources would be considered "significant." In order to accomplish this, the regulations incorporate the following four features:

All major new or modified sources would be required to incorporate Best Available Control Technology, as defined previously, thus insuring that deterioration by any major source is held to the lowest practicable minimum regardless of the air quality in the surrounding area.

Any proposed source would be required to submit detailed information to the State concerning the amount and type of emissions anticipated, and the projected impact of those emissions on the air quality in the surrounding areas. The requirement for this type of information is intended to insure that adequate information is available on which to base an objective assessment regarding the significance of any resulting deterioration. Although not specifically required by the proposed regulations, it is anticipated that in many cases the State or local agency would analyze this information in relation to other sources impacting on air quality in the area. This would permit identification of existing sources which could be candidates for additional emission control capable of minimizing or off-

setting the potential deterioration attributed to the proposed new source. In any event, the analysis of this type of information would insure that the decisions regarding the significance of any projected deterioration would be based upon the best information available.

The State would be required to make full disclosure of all pertinent information and solicit public participation in the determination of what constitutes significant deterioration. As a minimum, the State would serve public notice of the proposed construction or modification, would make full disclosure of source and State generated information, and would allow at least 30 days for public comment. However, the regulations for this alternative would not preclude the holding of public hearings if the proposal is of sufficient public interest. The intent of this requirement is to insure that the definition of significant deterioration is based upon all pertinent air quality data, the attitudes and goals of the affected population, and the socio-economic conditions and requirements of the affected area.

The State would then determine whether the source would create significant deterioration of air quality. The regulations would provide sufficient legal authority for all States to prohibit construction or modification which could result in significant deterioration of air quality, but pertinent information would also be submitted to the Environmental Protection Agency for review. The Administrator could disapprove the State's determination of what constitutes Best Available Control Technology, or could disapprove the procedures by which the determination of significant deterioration was made, but so long as the required procedures were followed the Administrator would not have authority to reverse the State's judgment of what constitutes significant deterioration in any specific location.

Under this alternative, sufficient information, procedures, and legal authority would be provided to make a

valid determination of what constitutes significant deterioration, in the view of the affected public, and to enforce the prevention of that deterioration regardless of any unique circumstances surrounding any individual case. However, sufficient safeguards would be included to insure that a State's determination that the resulting deterioration was not significant could not be used to circumvent other requirements dealing with National Ambient Air Quality Standards, New Source Performance Standards, State emission limitations, or any other legal requirements designed to protect the quality of the ambient air.

This approach has the major advantage that the governmental units and citizens most affected by decisions on maintenance of air quality would make those decisions, based upon conditions existing at that time, thereby ensuring that local requirements and preferences with regard to matters such as land use, economic development, and use of natural resources are taken into consideration. Thus, economic growth would not be arbitrarily restricted to conform to national views on nationwide deterioration, but, rather, would be subjected to State and local decisions as to the form, direction, extent, and distribution of such growth and as to the conditions to be imposed on the construction or modification of facilities which could have a significant impact on air quality.

A somewhat modified version of this plan is currently in restricted use in portions of several States. In these cases, the States have established extremely low ambient air quality standards for selected regions within their boundaries, in most cases to protect State parks, national forests, scenic vistas, etc. This is, of course, within the rights of all States, but many States do not currently have adequate legal authority to prevent construction or modification unless the national ambient air quality standards are threatened. It would, therefore, be necessary to promulgate Federal regulations of the type presented herein

to give all States the required legal authority until they can pass suitable State legislation.

Although this alternative is intuitively attractive for a variety of reasons, it is not without drawbacks. There is some justifiable concern that State and local agencies and populations could be subjected to undue pressure exerted by industries desirous of locating within a particular area, and that this pressure could cause definitions of "significant" which might not be in the best long-range interests of these populations. Additionally, the local definition plan uses what is essentially a "sliding baseline" in that deterioration is always measured relative to the current air quality. Hence, there is no control over the ultimate level of deterioration, which could progress in finite increments up to the level of the secondary standards. A final major disadvantage of this alternative is that the long range impact of deterioration is not completely restricted to the local area. The proposed regulations associated with this plan require public comment from within "the area significantly affected by the potential emissions." However, it is entirely possible that the cumulative effects of a large number of "growth-oriented" regions could have a significant impact on the air quality of neighboring "clean-air oriented" regions, and these neighboring regions would thereby lose control over their own environment. Although the feature that the State, rather than the local population, has final authority for the definition of significant tends to mitigate this concern, it nevertheless remains a problem which could lead to inequitable treatment of some areas.

IV. AREA CLASSIFICATION PLAN

One of the major problems associated with the previously discussed Air Quality Increment Plan involves the possible inequities resulting from establishment of a single air quality increment applicable nationwide. The fourth alternative proposed herein partially alleviates this prob-

lem by defining two nationwide air quality increments which would be applied to the appropriate areas of the State compatible with the long range growth patterns and development objectives associated with each of those areas. The application of this proposed alternative would be similar to that of the Air Quality Increment Plan except for the features noted herein.

The proposed regulations would require each State to identify each area of its territory as belonging to one of the two "zones" of allowable deterioration. The following table presents the proposed zones with their associated deterioration increments.

[18993]

PERMISSIBLE DETERIORATION INCREMENTS ($\mu\text{g}/\text{m}^3$)

	Particulate Matter		Sulfur Dioxide		
	Annual	24 Hour	Annual	24 Hour	3 Hour
Zone I....	5	15	2	5	25
Zone II...	10	30	15	100	300

Deterioration above the Zone II levels would constitute, in the Administrator's judgment, a significant deterioration in most areas of the country. This level is identical to that of the Air Quality Increment Plan and, as discussed under that Plan, would permit a reasonable amount of growth potential so long as well developed air pollution control strategies are applied. This increment would provide a strong incentive for improved control technology, would prevent construction of new sources in locations conducive to higher than normal ground level concentrations, would prevent clustering of major new sources, and would require that both new and existing sources employ increasingly effective control technology in order to maintain a reasonable growth capability for the region. The proposed regula-

tions specify that the Zone II criteria would become effective nationwide upon promulgation of these regulations.

Zone I represents an extremely stringent deterioration criteria, and application of this increment would prohibit the introduction of even one small fossil fuel fired power plant, municipal incinerator, medium apartment complex (assuming oil heating), or any other medium scale residential or commercial development using normal emission control techniques. However, this does not necessarily mean that development would be totally prohibited: It means only that new emissions would be permitted only to the degree that current emissions are reduced. Strong incentives are therefore inherent for improved emission control technology and introduction of low-pollution development. Although Zone I could be applied to a semi-urban or urban area in which it was desired to inhibit further development; it is anticipated that Zone I would normally be applied to those ultra-clean areas such as national and state forests and parks, and other recreational areas in which it is desired to maintain essentially no deterioration of air quality.

The regulations proposed in support of this plan also contain provisions for exceptions to the required deterioration increments in special circumstances. It could be in the public interest to permit some isolated areas a higher increment in circumstances under which the resulting deterioration would not be considered significant. Each of these cases would require public hearings in the areas involved, and would require specific approval by the Administrator. It is expected that these cases would exist infrequently, but they might occur due to the unusual availability of raw materials in the area; or in order to support comprehensive, long-range development plans; or to avoid the necessity for locating relatively pollution-prone industries near populated areas where a larger deterioration increment might be available. As further insurance that the State's request for an exception is justified, the administrator would consider

the extent to which the State has applied Zone I criteria as an expression of good faith efforts to comply with the intent of the proposed regulations.

The proposed regulations require that States accomplish initial zoning within six months from the date of promulgation of these regulations. Retention of the Zone II criteria in an area would be considered the norm, and the degree of public participation would be at the State's discretion. Assignment of Zone I would require that public hearings be held in the region affected due to the severe growth restrictions inherent in the Zone I criteria. If any State fails to submit the required plan, all areas of the State would remain under the Zone II criteria as assigned upon promulgation of these regulations.

Subsequent to submittal of the initial zoning plan, changes in the plan could be accomplished to accommodate changes in growth patterns and development plans; such proposed changes would be presented at public hearings in each of the affected areas.

It is important to note that the proposed regulations would not allow the Administrator to disapprove any assignment of zones made by the State so long as the required procedures are carried out. By requiring the establishment of these zones, and specifying the maximum allowable deterioration associated with each zone, it is not the Administrator's intention to establish how the land in any particular area should be used, nor to establish any particular relationship between current air quality and assigned zoning. Areas assigned to Zone I could retain an option for significant growth capability: The very stringent air quality criteria require only that any growth be restricted to a form which has a low air pollution potential. Use of the land is the prerogative of the State and local population, and hence complete flexibility is provided, consistent with prevention of significant deterioration as appropriate for each zone. In making the determinations necessary to implement

this alternative, the States would be encouraged to consider many factors, including but not limited to: growth projections and local land use plans; existing land use; location of raw materials and markets; and existing constraints on land use imposed by other State, local, and Federal requirements.

Unfortunately, as with the Air Quality Increment Plan, the type of air quality data needed to accurately establish the baseline air quality for this alternative is not currently available in many clean areas of the country. It would therefore become necessary to estimate this information by use of diffusion modeling and other appropriate techniques. To eventually alleviate these problems, the plan would establish additional air quality monitoring requirements around new major sources.

Despite the data availability problems, this alternative has some very attractive features. Unlike the other ceiling plans proposed herein, this plan ensures that future developmental patterns can be based on rational planning rather than on previous growth patterns which form the basis for most other ceiling approaches. This alternative also seems superior to the "local definition" plan, in that it is not based on case-by-case local projections of growth patterns which may not be desirable from an overall point of view, but requires that the State establish long range growth patterns and goals. In essence, this plan puts emphasis on longer range strategic planning as opposed to short range case-by-case decisions. The plan also gives States the flexibility needed to meet their long range growth goals without the imposition of arbitrary constraints.

This alternative also has some drawbacks. The proposed regulations require that the State make very difficult and comprehensive decisions impacting on land use in a tight time frame. The results of these State decisions would have far reaching implications on the future of many States. There are no firm criteria which a State may use to make

its decisions and as a result, the decisions would be somewhat subjective in nature. The required decisions also would force the States to exercise great care in establishing the boundaries between zones so that the effect of a source in a Zone II does not cause the air quality in a Zone I to increase more than allowed. This problem becomes more severe along State boundaries and would require cooperation among States. Nevertheless, of the available alternatives for preventing significant deterioration, this plan appears to be superior in many, if not all, respects.

OTHER PLANS OF INTEREST

Although the preceding plans (including variations and combinations of these) represent the more feasible alternatives for preventing significant deterioration, the Administrator has given a variety of other plans careful consideration. Two of the more interesting are based upon a volumetric emission density restriction, and application of an emission charge or penalty.

The application of a volumetric emission density restriction is the essential feature of a plan proposed by the Sierra Club. Under this plan, significant deterioration for most pollutants would be defined as either a small incremental increase, or a percentage increase in pollutant concentration, averaged either over that volume of air within one km of the source, or that ground level area within one km of the source, whichever gives the higher value. Although the impact of this criteria is highly dependent upon the instantaneous local meteorological conditions, the philosophy is essentially similar to that of more conventional air quality and emission limitation plans. [18994] The fundamental difference is that the Sierra Club plan considers an exceptionally small area (or volume) on which to base the deterioration criteria. This requires that, in order to restrict regional deterioration to reasonable levels, the allowable increment applied to the one km baseline area must

be very small. The result is that this plan would permit a large number of small sources to be uniformly distributed throughout the region, but would completely prohibit construction of conventional coal fired power plants and other major sources of the type listed in the proposed regulations, unless those sources were located in areas in which major improvements in air quality had been accomplished after the baseline level had been established. This feature would tend to drive all new major sources of air pollution into the more heavily populated sections of the country. This anomaly is the result of choosing too small an area (or volume) over which to average the emissions, and is no more a failure of the volumetric averaging technique than any technique in which emission density restrictions are applied to an excessively small area. Conversely, if too large an area is chosen, then the peak concentrations in a local area may become excessive even though total atmospheric loading is reduced. However, the volumetric averaging plan is not proposed herein primarily because the computation technique is unnecessarily complex and is only indirectly representative of the physical characteristics of pollution sources, the baseline data required (particularly for particulates) is largely nonexistent, the monitoring and control costs would be excessive, and simpler plans could be developed to achieve substantially the same results without the practical application problems inherent in the volumetric averaging concept.

A second type of plan containing interesting ramifications but which had to be rejected for practical reasons was one based on the imposition of emission charges. The general reasoning behind such a plan is that secondary NAAQS comprise adequate upper limits on pollutant concentrations, but air quality superior to those limits is desirable. The emission charge would provide a continuous incentive for sources to seek and apply emission controls to minimize their emission charges. The collective effect of these indi-

vidual cost minimizations would be to maintain air quality at levels superior to NAAQS in most areas. The level of air quality maintained would be a function of the emission charge rate, the development potential of the area, and the state-of-the-art of emission control.

The major advantages of this plan are that the cost of emitting would be "internalized", i.e., it would be taken into consideration in the normal economic appraisal of plant design and location alternatives. Sources would have numerous options as to control method, cost, and degree of control from which to make the optimum choice. The state-of-the-art of emission control would be continuously advanced. Finally, the means of enforcement would be charge collection for which there is ample precedent and experience.

Unfortunately, several problems attend such a plan, particularly in view of the requirement that "significant deterioration" be prevented in any portion of any State. If significant deterioration of air quality is to be prevented by the emission charge, some relationship between the charge rate and the resultant air quality must be found. Such a relationship is not presently available. Even if this relationship were available, the emission charge rate would have to vary from place to place to offset the variation in developmental potential offered by different land areas and the variable capacity of the air to disperse waste under different meteorological and topographical conditions. But most important, an emission charge would not guarantee that significant deterioration could not take place in some portions of some States. Consequently, the emission charge, while possessing some desirable attributes, does not appear to be a practical means of preventing significant deterioration of air quality.

PROBLEMS COMMON TO ALL DETERIORATION PLANS

Jurisdictional Ambiguities—There is a potential jurisdictional problem associated with all plans proposed to prevent significant deterioration. The problem could arise whenever a source in one State is degrading the air quality of a second State. The problem is compounded when small deterioration increments or ceilings are established because a relatively small external source may "use up" a large portion of the growth potential available to the neighboring regions. The region in question would have no apparent resource, and its own growth potential would thereby be curtailed. The recent court order has established the Administrator's authority to prevent significant deterioration regardless of the source's location, but the Administrator has no criteria by which he can dictate whether the allowable deterioration should be allocated to an internal or external source. Hence, in cases such as this, any allowable deterioration increment would have to be allocated on a "first come, first served" basis, regardless of the location of the source.

De Facto Land Use Decisions—It has been pointed out previously that all currently practical plans to prevent significant deterioration essentially impose restrictions on the use of the air resource, and hence, use of land. Depending upon the plan selected, these restrictions would be imposed by local, State, or Federal decisions. However, in all cases, there is a certain amount of flexibility inherent in the regulations regarding land use, and the States are encouraged to exploit this flexibility in order to make most effective use of the available resources. This exploitation is expected to take the form of State legislation permitting State determination of the type and amount of developmental growth authorized to "use" the allowable air quality increment. Complementary to enactment of this legislation would be long range planning actions to determine the type of growth desired, any constraints on this growth in addition to air quality deterioration constraints, and any additional means

for air quality improvements which might, in turn, make possible additional growth. In the absence of such State action, it can be anticipated that the allowable deterioration increment will be used up quite rapidly in many areas, and that this use would be made on a "first come—first served" basis without regard for the longer range requirements and goals of the region. In effect, Federal promulgation of any of the alternatives proposed herein will force States to develop and implement additional land use planning activities through which the available air resource can be allocated for the optimum purposes. These activities will be actively encouraged by the Administrator, and it is planned that eventually the prevention of significant deterioration will be accomplished solely through State Implementation Plan procedures, although such SIPs would have to be in accordance with Federal guidelines.

The Impact of Urban Sprawl—This problem refers to the characteristic trend of most urban areas to spread in to the surrounding countryside thereby creating gradual air quality deterioration due to residential heating and associated small but numerous sources of emission. There is no adequate deterioration plan which can automatically accommodate this deterioration, and yet urban sprawl can use up a large portion of any allowable deterioration increment. The periodic development of emission inventories, and routine air quality sampling, will track the effect of this sprawl, but it must also be projected into the future in order to insure that its impact, in addition to the impact of new major sources, does not violate the deterioration restrictions. For this reason, it may become desirable to include requirements for growth projections in the proposed regulations in a manner similar to those of the recently promulgated complex source regulations.

The Impact of Fuel Switching—Many sources have the capability to switch among various types of fuel—i.e., natural gas, low and high sulfur oil, low and high sulfur coal,

etc.—thus altering their emission levels. Although there is generally sufficient low sulfur fuel available, in conjunction with other emission reduction techniques, to attain and maintain the national standards nationwide, there is not currently sufficient fuel of this type (particularly low sulfur coal) to satisfy all potential users. Accordingly, it may become necessary for some sources in relatively clean areas to temporarily switch to higher sulfur fuel in order to make available additional low sulfur [18995] fuel for use in areas in which the ambient air quality could have an adverse impact on public health. Because pollutant emissions are approximately proportional to the sulfur content of the fuel (i.e., a switch from 1 percent to 3 percent sulfur coal would approximately triple sulfur oxides emissions) this procedure would tend to temporarily degrade air quality in clean areas. A preliminary review indicates that most plans to prevent deterioration could accommodate this temporary increase in emissions. However, it is conceivable that there may be unusual cases, as where a source might have to switch from natural gas to coal, which could not be accommodated within some proposed deterioration limits. The Administrator solicits all available information concerning cases of this type, and is interested in comments on the advisability of including variance procedures in the proposed regulations to accommodate temporary emission increases of this type.

The Right of Regional Self-Sufficiency—It is desirable that all participants in this rulemaking carefully consider the full impact of deterioration restrictions, particularly as they would influence relatively clean areas in which the allowable deterioration increments might be very small. Due impact to the threat to the NAAQS, most large urban areas can no longer provide enough electrical power to supply their own needs; their power must come from non-urban, relatively clean, areas. However, in the future it may develop that even non-urban areas will not be able to supply their own power needs due to the threat of significant de-

terioration. For example, Iowa can be considered as a typical agricultural State with only nominal heavy industry. It is estimated that by 1980, the rural areas of Iowa will require approximately 1,700 megawatts of additional power per year. The production of that power, with application of best available control technology and regionally available fuel, would produce approximately 160,000 tons of sulfur dioxide per year, or an approximately fifty percent increase in emissions over the 1970 levels for those areas. Any deterioration plan must consider factors such as these to insure that the impact on each individual region can be tolerated and is consistent with the public interest.

OPPORTUNITY FOR PUBLIC PARTICIPATION

The Administrator solicits widespread public involvement in all aspects of the significant deterioration issue, and interested individuals and groups are encouraged to actively participate in this rulemaking. In order to assist in the development of objective comments and debate, the Environmental Protection Agency's Office of Public Affairs and the Regional Offices will have available sets of technical documentation summarizing types and sizes of typical sources, typical emissions, estimated costs of emission controls, breakouts of total national emissions by type and type source, distribution of current emissions by AQCR, and associated data of value in assessing the impact of alternative deterioration plans. Copies of this information will be made available to the public upon request. Requestors should reference this issue of the *FEDERAL REGISTER*.

There are several questions on which EPA is particularly interested in receiving public comments and relevant data. One of the most important involves the concepts of "deterioration of air quality" and "significant deterioration of air quality." With respect to the term "deterioration," the question arises as to what type of change in ambient air quality represents "deterioration." With respect to "sig-

nificant deterioration," questions arise as to whether it should be interpreted in the absolute or relative sense, and whether it should be determined on a national, State, or regional basis. Attention is therefore expressly directed to, and public comment requested on, the questions of what might appropriately be considered "deterioration" and, further, what degree of deterioration might appropriately be considered "significant."

Other questions on which public comment and relevant data are particularly requested include: whether, if an Air Quality Increment Plan or Emission Limitation Plan is adopted, the specific increments or limitations proposed herein are appropriate to prevent significant deterioration without severely disrupting growth and development; whether it is necessary and appropriate to require application of best available control technology as a minimum requirement of any plan for preventing significant deterioration; and whether the proposed definition of best available technology is appropriate. EPA also requests information which would explicitly define the possible economic impact of each of the proposed alternatives. Finally, the fact that four alternatives are specifically presented does not preclude interested parties from offering others for consideration.

Public hearings on these proposals are scheduled as follows:

Washington, D.C.: August 27 and 28

Time and place to be announced.

Atlanta: September 4 and 5; 10:00 a.m.

Civic Center

395 Piedmont Avenue, N.E.

Dallas: September 5 and 6; 9:00 a.m.

Environmental Protection Agency

Suite 1000

Conference Rooms A and B

1600 Patterson Street

Denver: September 5 and 6; 9:00 a.m.

U.S. Post Office Auditorium

Room 269

1823 Stout Street

San Francisco: September 5 and 6; 9:00 a.m. to 5:00 p.m.

Hyatt Regency Hotel

Seacliff Room

Embarcadero Center

Written comments in triplicate may also be submitted to the Office of Air Quality Planning and Standards, Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attn: Mr. Padgett. All relevant comments received not later than 90 days after the date of publication of this notice will be considered. Receipt of comments will be acknowledged but substantive responses will not be provided. Comments received will be available for public inspection during normal business hours at the Office of Public Affairs, 401 M Street, SW., Washington, D.C. 20460.

These alternative amendments are being proposed pursuant to an order of the U.S. Court of Appeals for the District of Columbia Circuit in the case of *Sierra Club, et al., v. Administrator of EPA*, case No. 72-1528. This notice of proposed rulemaking is issued under the authority of section 301(a) of the Clean Air Act as amended (42 U.S.C. 1857, et seq.)

Dated: July 12, 1973.

ROBERT W. FRI,
Acting Administrator,

Environmental Protection Agency.

Subpart A, Part 52, Chapter I, Title 40, Code of Federal Regulations, is proposed to be amended by adding to

§ 52.21.a new paragraph (b) and one of the paragraphs herein designated (c), (d), (e), and (f):

§ 52.21 **Significant deterioration of air quality.**

(a) Subsequent to May 31, 1972, the Administrator reviewed State implementation plans to determine whether or not the plans permit or prevent significant deterioration of air quality in any portion of any State where the existing air quality is better than one or more of the secondary standards. The review indicates that State plans generally do not contain regulations or procedures specifically addressed to this problem. Accordingly, all State plans are disapproved to the extent that such plans lack procedures or regulations for preventing significant deterioration of air quality in portions of States, where air quality is now better than the secondary standards. The disapproval applies to all States listed in Subparts B through DDD of this part. Nothing in this section shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

(b) For purposes of this section:

(1) The term "baseline air quality concentration" means the maximum air quality concentrations measured or estimated in an area in which the proposed source has a significant effect representative of the year 1972 plus the estimated increase in those concentrations caused by all sources granted approval for construction prior to the date of proposal of this section in the **FEDERAL REGISTER** but not operating during the year 1972.

(2) The term "baseline emissions" means the annual emissions for the year 1972 plus the estimated emissions from [18996] all sources granted approval for construction prior to the date of proposal of this section in the **FEDERAL REGISTER** but not operating during the year 1972.

(3) The term "potential emission rate" means the total weight rate at which sulfur dioxide or particulate matter, in the absence of any air cleaning device, would be emitted from a stationary source when such source is operated at its rated capacity. Total weight rates shall be those actually expected for a specified source but in the absence of such information, it shall be estimated on the basis of the emission factors specified in "Compilation of Air Pollution Emission Factors," Office of Air Programs Publication No. AP-42, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina, February 1972.

(4) The term "air cleaning device" means any article, machine, equipment, or other contrivance, chemical or process, the use of which may eliminate, reduce or control the emission of air pollutants into the atmosphere.

(c) *Regulation for preventing significant deterioration of air quality through application of an air quality increment.* (1) This paragraph applies to sources identified below, the construction or modification of which is commenced after the date of proposal of this paragraph in the **FEDERAL REGISTER**.

(i) Any new or modified stationary source of a type listed below:

(a) Fossil-Fuel Fired Steam Electric Plants of more than 1000 million B.t.u. per hour heat input.

(b) Coal Cleaning Plants (thermal dryers).

(c) Kraft Pulp Mill Recovery Furnaces.

(d) Portland Cement Plants.

(e) Primary Zinc Smelters.

(f) Iron and Steel Mill Metallurgical Furnaces.

(g) Primary Aluminum Ore Reduction Plants.

(h) Primary Copper Smelters.

(i) Municipal Incinerators capable of charging more than 250 tons of refuse per day.

(j) Sulfuric Acid Plants.

(k) Petroleum Refineries.

(l) Lime Plants.

(m) Phosphate Rock Processing Plants.

(n) By-Product Coke Oven Batteries.

(o) Sulfur Recovery Plants.

(p) Carbon Black Plants (furnace process).

(ii) Any new or modified stationary source not identified in subdivision (i) of this subparagraph having a total annual potential emission rate on any premises equal to or greater than 4000 tons for any of the following pollutants.

(a) Particulate matter.

(b) Sulfur dioxide.

(c) Nitrogen oxides.

(d) Hydrocarbons.

(e) Carbon monoxide.

(2) No owner or operator shall commence construction or modification of a source to which this paragraph is applicable unless:

(i) The State in which the source is or will be located determines in accordance with this paragraph:

(a) That the effect on air quality of the source or modification of the source considered with the effect on air quality of existing, new or modified sources, will not cause the air quality to be increased above the baseline air quality concentration by more than any of the following:

(1) 10 $\mu\text{g}/\text{m}^3$ of particulate matter, annual geometric mean.

(2) 30 $\mu\text{g}/\text{m}^3$ of particulate matter, 24-hour maximum.

(3) 15 $\mu\text{g}/\text{m}^3$ of sulfur dioxide, annual arithmetic mean.

(4) 100 $\mu\text{g}/\text{m}^3$ of sulfur dioxide, 24-hour maximum.

(5) 300 $\mu\text{g}/\text{m}^3$ of sulfur dioxide, 3-hour maximum.

(b) That the source or modified portion of the source will be constructed and operated to employ best available control technology for minimizing emissions of particulate matter, sulfur dioxide, nitrogen oxides, hydrocarbons, and carbon monoxide.

(ii) The Administrator approves the State's determination under subdivision (i) of this subparagraph.

(3) In making the determinations required by subparagraph (2)(i) of this paragraph, the State shall, as a minimum, require the source to submit: Site information, plans, descriptions, specifications, and drawings showing the design of the source, calculations showing the nature and amount of emissions, a description of the manner in which the source will be operated and controlled, the cost of control, measurements or estimates of existing air quality levels, and the impact that the construction or modification will have on air quality levels and the air environment around the source.

(4)(i) In determining best available control technology, the following shall be considered:

(a) Reasonably available control technology as defined in Appendix B to Part 51 of this chapter,

(b) The process, fuels, and raw materials employed,

(c) The engineering aspects of the application of various types of control techniques,

(d) Process and fuel changes, and

(e) The cost of the application of the control techniques, process changes, alternative fuels, etc.

(ii) A system of control which is determined by the State and approved by the Administrator to be adequate to comply with standards of performance for new stationary sources under Part 60 of this chapter may be deemed to constitute best available control technology.

NOTE: Under the alternative definition of Best Available Control Technology, as set forth in the preamble, subdivision (iii) would be eliminated.

(iii) In the case of sources identified at subparagraph (1)(i)(a) of this paragraph, best available control technology for sulfur oxides shall consist, as a minimum, of a control strategy determined to be capable of complying with standards of performance for new stationary sources specified in Part 60 of this chapter. However, individual analysis of each new or modified source which considers the availability of fuel and the cost and efficiency of other or additional control strategies may result in additional control for individual plants.

(5) Subject to subdivision (x) of this subparagraph, the owner or operator of a source subject to the provisions of subparagraph (2) of this paragraph shall install, or cause to be installed, a minimum of two continuous ambient air quality monitoring instruments for sulfur dioxide and/or two intermittent ambient air quality monitoring instruments for particulate matter.

(i) The State shall specify which pollutant(s) the source shall monitor.

(ii) When source, meteorological and/or terrain conditions warrant, the State may require additional samplers above the minimum number specified in this paragraph.

(iii) Such systems shall include one site equipped to monitor wind speed and wind direction.

(iv) The instruments shall meet the performance and operating specifications of § 51.17(a)(1) of this chapter.

(v) The locations of such instruments shall be located in areas of expected maximum concentrations determined by meteorological diffusion modeling or best judgment.

(vi) The instruments shall be maintained, calibrated, and operated in accordance with the methods prescribed by the manufacturer of such instrument(s) and other procedures consistent with good engineering practice.

(vii) The owner or operator of the source subject to this paragraph shall maintain a record of all measurements required by this subparagraph. Measurement results shall be summarized monthly and reported to the State semiannually, and shall be submitted within 45 days after the end of the reporting period. Reporting periods are January 1-June 30 and July 1-December 31, with the initial reporting period starting as indicated in subdivision (viii) of this subparagraph.

(viii) The continuous monitoring and recordkeeping requirements of this subparagraph shall become applicable 6 months after initial start-up of the source.

(ix) Information collected pursuant to this subparagraph shall be made available to the Administrator upon his request.

(x) The State may demonstrate to the Administrator that the existing air quality surveillance system in the area in which a source is to be constructed or modified meets the requirements of this subparagraph.

(6)(i) Prior to making the determinations required by subparagraph (2)(i) of this paragraph, the State shall provide opportunity for public comment on the information submitted by the owner or [18997] operator and on the State's analysis of the effect of such construction or modification on ambient air quality. Opportunity for public comment shall include, as a minimum:

(a) Availability for public inspection, in at least one location in the region affected, of the information submitted by the owner or operator, and the State or local agency's analysis of the effect on air quality,

(b) a 30-day period for submittal of public comment, and

(c) a notice by prominent advertisement in the region affected of the location of the source information and analysis specified in subparagraphs (2)(i), and (3) of this paragraph.

(ii) Within 90 days from an owner or operator's submission of the information required under subparagraph (3) of this paragraph, the State shall publicly announce and transmit in writing to the Administrator its determinations under subparagraph (2)(i) of this paragraph, together with:

(a) Copies of all information prepared by the State under subparagraph (2)(i) of this paragraph; (b) a copy of the public notices issued in conformity with subdivision (i) of this subparagraph and (c) a statement that the State has complied with the requirements of this paragraph.

(7)(i) The Administrator will notify the State of his determination and the reasons for any disagreement under subparagraph (2)(ii) of this paragraph no later than 25 days following the State's submission of the information required under subparagraph (6)(ii) of this paragraph.

(ii) The State will notify the owner or operator in writing of the approval or denial to construct or modify a source within 120 days of the owner or operator's submission of the information required under subparagraph (3) of this paragraph.

(8) The Administrator may cancel an approval to construct if the construction is not begun within two years from the date of issuance, or if during the construction, work is suspended for one year.

(9) Approval to construct or modify shall not relieve any owner or operator of the responsibility to comply with all local, State, or Federal regulations which are part of the applicable plan.

(d) *Regulation for preventing significant deterioration of air quality through application of an emission ceiling.*

(1) This paragraph applies to sources identified below, the construction or modification of which is commenced in any Air Quality Control Region (AQCR) classified Priority Ia or III with respect to sulfur dioxide and/or particulate matter, after the date of proposal of this paragraph in the FEDERAL REGISTER.

(i) Any new or modified stationary source of a type listed below:

(a) Fossil-Fuel Fired Steam Electric Plants of more than 1000 million B.t.u. per hour heat input.

(b) Coal Cleaning Plants (thermal dryers).

(c) Kraft Pulp Mill Recovery Furnaces.

(d) Portland Cement Plants.

(e) Primary Zinc Smelters.

(f) Iron and Steel Mill Metallurgical Furnaces.

(g) Primary Aluminum Ore Reduction Plants.

(h) Primary Copper Smelters.

(i) Municipal Incinerators capable of charging more than 250 tons of refuse per day.

(j) Sulfuric Acid Plants.

(k) Petroleum Refineries.

- (l) Lime Plants.
- (m) Phosphate Rock Processing Plants.
- (n) By-Product Coke Oven Batteries.
- (o) Sulfur Recovery Plants.
- (p) Carbon Black Plants (furnace process).

(ii) Any new or modified stationary source not identified in subdivision (i) of this subparagraph having a total annual potential emission rate on any premises equal to or greater than 4000 tons for any of the following pollutants:

- (a) Particulate matter.
- (b) Sulfur dioxide.
- (c) Nitrogen oxides.
- (d) Hydrocarbons.
- (e) Carbon monoxide.

(2) No owner or operator shall commence construction or modification of a source to which this paragraph is applicable unless:

(i) The State in which the source is or will be located determines in accordance with this paragraph:

(a) That the source or modified portion of the source considered with the cumulative effect on emission levels of all existing, new or modified stationary sources will not cause the maximum allowable emissions as determined by subparagraph (9) of this paragraph to be exceeded.

(b) That the source or modified portion of the source will be constructed and operated to employ best available control technology for minimizing emissions of particulate matter, sulfur dioxide, nitrogen oxides, hydrocarbons, and carbon monoxide.

(ii) The Administrator approves the State's determination under subdivision (i) of this subparagraph.

(3) In making the determinations required by subparagraph (2)(i) of this paragraph, the State shall, as a minimum, require the source to submit: Site information, plans, descriptions, specifications, and drawings showing the design of the source, calculations showing the nature and amount of emissions, a description of the manner in which the source will be operated and controlled, and the cost of control.

(4)(i) In determining best available control technology, the following shall be considered:

(a) Reasonably available control technology as defined in Appendix B to Part 51 of this chapter,

(b) The process, fuels, and raw materials employed,

(c) The engineering aspects of the application of various types of control techniques,

(d) Process and fuel changes, and

(e) The cost of the application of the control techniques, process changes, alternative fuels, etc.

(ii) A system of control which is determined by the State and approved by the Administrator to be adequate to comply with standards of performance for new stationary sources under Part 60 of this chapter may be deemed to constitute best available control technology.

(iii) In the case of sources identified at subparagraph (1)(i)(a) of this paragraph, best available control technology for sulfur oxides shall consist, as a minimum, of a control strategy determined to be capable of complying with standards of performance for new stationary sources specified in Part 60 of this chapter. However, individual analysis of each new or modified source which considers the availability of fuel and the cost and efficiency of other or additional control strategies may result in additional control for individual plants.

NOTE: Under the alternative definition of Best Available Control Technology, as set forth in the preamble, subdivision (iii) would be eliminated.

(5)(i) Prior to making the determinations required by subparagraph (2)(i) of this paragraph, the State shall provide opportunity for public comment on the information submitted by the owner or operator and on the agency's review of such information. Opportunity for public comment shall include, as a minimum:

(a) Availability for public inspection, in at least one location in the region affected, of the information submitted by the owner or operator, and the State or local agency's analysis of such information,

(b) A 30-day period for submittal of public comment, and

(c) A notice by prominent advertisement in the region affected of the location of the source information and analysis specified in subparagraphs (2)(i), and (3) of this paragraph.

(ii) Within 60 days from an owner or operator's submission of the information required under subparagraph (3) of this paragraph, the State shall also publicly announce and transmit in writing to the Administrator its determinations under subparagraph (2)(i) of this paragraph, together with:

(a) A copy of the public hearing notices issued in conformity with subdivision (i) of this subparagraph and

(b) A statement that the State has complied with the requirements of this paragraph.

(6)(i) The Administrator will notify the State of his determination and reasons for any disagreement under subparagraph (2)(ii) of this paragraph no later than 25

days following the State's submission of the information required under subparagraph (5)(ii) of this paragraph. (ii) The State will notify the [18998] owner or operator in writing of the approval or denial to construct or modify a source within 90 days of an owner or operator's submission of the information required under subparagraph (3) of this paragraph.

(7) The Administrator may cancel an approval to construct if the construction is not begun within two years from the date of issuance, or if during the construction, work is suspended for one year.

(8) Approval to construct or modify shall not relieve any owner or operator of the responsibility to comply with all local, State, or Federal regulations which are part of the applicable plan.

(9) The maximum allowable emissions for an Air Quality Control Region shall be the following:

(i) For particulate matter the product of the area (square miles) for an AQCR and 3 tons of particulate matter/year/square mile or 120 percent of the baseline emissions for particulate matter, whichever is greater.

(ii) For sulfur oxides the product of the area (square miles) of an AQCR and 10 tons of sulfur dioxide/year/square mile or 120 percent of the baseline emissions for sulfur dioxide, whichever is greater.

(10) The State shall make available to the Administrator upon his request:

(i) The baseline emission inventory for particulate matter and sulfur dioxide, and

(ii) An annually updated emission inventory for each affected AQCR for all pollutants to which this paragraph is applicable.

(e) *Regulation for preventing significant deterioration of air quality through a local definition of significant deterioration.* (1) This paragraph applies to sources identified below, the construction or modification of which is commenced after the date of proposal of this paragraph in the FEDERAL REGISTER.

(i) Any new or modified stationary source of a type listed below:

(a) Fossil-Fuel Fired Steam Electric Plants of more than 1000 million B.t.u. per hour heat input.

(b) Coal Cleaning Plants (thermal dryers).

(c) Kraft Pulp Mill Recovery Furnaces.

(d) Portland Cement Plants.

(e) Primary Zinc Smelters.

(f) Iron and Steel Mill Metallurgical Furnaces.

(g) Primary Aluminum Ore Reduction Plants.

(h) Primary Copper Smelters.

(i) Municipal Incinerators capable of charging more than 250 tons of refuse per day.

(j) Sulfuric Acid Plants.

(k) Petroleum Refineries.

(l) Lime Plants.

(m) Phosphate Rock Processing Plants.

(n) By-Product Coke Oven Batteries.

(o) Sulfur Recovery Plants.

(p) Carbon Black Plants (furnace process).

(ii) Any new or modified stationary source not identified in subdivision (i) of this subparagraph having a total annual potential emission rate on any premises equal

to or greater than 4000 tons for any of the following pollutants.

(a) Particulate matter.

(b) Sulfur dioxide.

(c) Nitrogen oxides.

(d) Hydrocarbons.

(e) Carbon monoxide.

(2) No owner or operator shall commence construction or modification of a source to which this paragraph is applicable unless:

(i) The State in which the source is or will be located determines in accordance with this paragraph:

(a) That the source or modified portion of the source will be constructed and operated to employ best available control technology for minimizing emissions of particulate matter, sulfur dioxide, nitrogen oxides, hydrocarbons, and carbon monoxide.

(b) That particulate matter and sulfur dioxide emissions from the source when controlled by best available control technology will not cause significant deterioration in air quality;

(ii) The Administrator approves the State's determination under subdivision (i)(a) of this subparagraph.

(iii) The Administrator approves the procedure employed by the State in making the determination required by subdivision (i)(b) of this subparagraph.

(3) No owner or operator shall operate a source to which this paragraph applies unless the emission control system determined to constitute best available control technology and approved by the Administrator under this paragraph is fully installed and properly functioning.

(4) No determination or approval under this paragraph shall relieve any source from compliance with any local, State or Federal requirement which is part of the implementation plan, including any standard of performance under Part 60 of this chapter.

(5)(i) In determining best available control technology, the following shall be considered:

(a) Reasonably available control technology as defined in Appendix B to Part 51 of this chapter,

(b) The process, fuels, and raw material employed,

(c) The engineering aspects of the application of various types of control techniques,

(d) Process and fuel changes, and

(e) The cost of the application of the control techniques, process changes, alternative fuels, etc.

(ii) Except as provided in subdivision (iii) of this subparagraph a system of control which is determined by the State and approved by the Administrator to be adequate to comply with standards of performance for new stationary sources under Part 60 of this chapter may be deemed to constitute best available control technology.

(iii) In the case of sources identified at subparagraph (1)(i)(a) of this paragraph, best available control technology for sulfur oxides shall consist, as a minimum, of a control strategy determined to be capable of complying with standards of performance for new stationary sources specified in Part 60 of this chapter. However, individual analysis of each new or modified source which considers the availability of fuel and the cost and efficiency of other or additional control strategies may result in additional control for individual plants.

NOTE: Under the alternative definition of Best Available Control Technology, as set forth in the preamble, subdivision (iii) would be eliminated.

(6) In making the determinations required by subparagraph (2)(i) of this paragraph, the State shall, as a minimum, require the source to submit: site information, plans, descriptions, specifications, and drawings showing the design of the source, calculations showing the nature and amount of emissions, a description of the manner in which the source will be operated and controlled, the cost of control, an estimate of existing air quality levels, and the impact that the construction or modification will have on air quality levels and the air environment around the source.

(7)(i) Prior to making the determinations required by subparagraph (2)(i) of this paragraph, the State shall provide opportunity for public comment on the information submitted by the owner or operator and on the agency's analysis of the effect of such construction or modification on ambient air quality. Opportunity for public comment shall include, as a minimum:

(a) Availability for public inspection, in at least one location in the region affected, of the information submitted by the owner or operator, and the State or local agency's analysis of the effect on air quality,

(b) A 30-day period for submittal of public comment, and

(c) A notice by prominent advertisement in the region affected of the location of the source information and analysis specified in subparagraphs (2)(i) and (3) of this paragraph.

(ii) Within 90 days from an owner or operator's submission of the information required under subparagraph (3) of this paragraph, the State shall also publicly announce and transmit in writing to the Administrator its determinations under subparagraph (2)(i) of this paragraph, together with: (a) copies of all information prepared by the State under subparagraph (2)(i) of this

paragraph; (b) a copy of the public notices issued in conformity with subdivision (i) of this subparagraph and (c) a statement that the State has complied with the requirements of this paragraph.

(8)(i) The Administrator will notify the State of his determination and reasons for any disagreement under subparagraph (2)(ii) of this paragraph no later than 25 days following the State's submission of the information required under subparagraph (6)(ii) of this paragraph.

(ii) The State will act within 120 days on an owner or operator's submission of [18999] the information required under subparagraph (6) of this paragraph and will notify the owner or operator in writing of the approval or denial to construct or modify a source.

(9) The Administrator may cancel an approval to construct if the construction is not begun within two years from the date of issuance, or if during the construction, work is suspended for one year.

(f) *Regulation for preventing significant deterioration of air quality through application of area classification.*

(1) This paragraph applies to sources identified below, the construction or modification of which is commenced after the date of proposal of this paragraph in the FEDERAL REGISTER.

(i) Any new or modified stationary source of a type listed below:

(a) Fossil-Fuel Fired Steam Electric Plants of more than 1000 million B.t.u. per hour heat input.

(b) Coal Cleaning Plants (thermal dryers).

(c) Kraft Pulp Mill Recovery Furnaces.

(d) Portland Cement Plants.

(e) Primary Zinc Smelters.

(f) Iron and Steel Mill Metallurgical Furnaces.

(g) Primary Aluminum Ore Reduction Plants.

(h) Primary Copper Smelters.

(i) Municipal Incinerators capable of charging more than 250 tons of refuse per day.

(j) Sulfuric Acid Plants.

(k) Petroleum Refineries.

(l) Lime Plants.

(m) Phosphate Rock Processing Plants.

(n) By-Product Coke Oven Batteries.

(o) Sulfur Recovery Plants.

(p) Carbon Black Plants (furnace process).

(ii) Any new or modified stationary source not identified in subdivision (i) of this subparagraph having a total annual potential emission rate on any premises equal to or greater than 4000 tons for any of the following pollutants:

(a) Particulate matter.

(b) Sulfur dioxide.

(c) Nitrogen oxides.

(d) Hydrocarbons.

(e) Carbon monoxide.

(2) For purposes of this paragraph areas of a State classified as Zone I or Zone II shall be limited to increases in pollutant concentrations shown below:

AREA CLASSIFICATION

Pollutant	Zone I	Zone II
Particulate matter:		
Annual geometric mean	5	10
24-hour maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hour maximum	5	100
3-hour maximum	25	300

(3)(i) All areas of all States are classified as Zone II as of the effective date of this regulation.

(ii) The State may, within six (6) months subsequent to the effective date of this regulation:

(a) Submit to the Administrator, after a public hearing has been held, a designation showing certain areas of the State which are classified Zone I.

(b) Submit for the Administrator's approval plans showing certain limited areas of the State which may be allowed to increase concentrations of particulate matter and sulfur dioxide up to the national ambient air quality standards provided that:

(1) Public hearings are held.

(2) Appropriate documentation is submitted to justify such a request. This documentation shall include an explanation of the special characteristics of the area which demonstrates why this area should be allowed to increase in concentration up to the national standard. This explanation shall include such materials as developmental plans, location of raw materials such as mineral deposits, markets, growth and economic projections. In addition, the State must demonstrate that they considered classifying

as Zone I areas of the State of recreational, ecological, and scenic value.

(4) No owner or operator shall commence construction or modification of a source to which this paragraph is applicable unless:

(i) The State in which the source is or will be located determines in accordance with this paragraph:

(a) That the effect on air quality concentrations of the source or modification considered with the effect on air quality concentrations of all other existing, new, and modified sources will not cause the baseline air quality concentration in any zone of the State to be increased above the limits shown in subparagraph (2) of this paragraph.

(b) That the source or modified portion of the source will be constructed and operated to employ best available control technology for minimizing emissions of particulate matter, sulfur dioxide, nitrogen oxides, hydrocarbons, and carbon monoxide.

(ii) The Administrator shall approve the State's determination under subdivision (i) of this paragraph.

(5) In making the determinations required by subparagraphs (4)(i) of this paragraph, the State shall, as a minimum, require the source to submit: Site information, plans, descriptions, specifications, and drawings showing the design of the source, calculations showing the nature and amount of emissions, a description of the manner in which the source will be operated and controlled, the cost of control, an estimate of existing air quality levels, and the impact that the construction or modification will have on air quality levels and the air environment around the source.

(6)(i) In determining best available control technology, the following shall be considered:

(a) Reasonably available control technology as defined in Appendix B to Part 51 of this chapter,

(b) The process, fuels, and raw materials employed,

(c) The engineering aspects of the application of various types of control techniques,

(d) Process and fuel changes, and

(e) The cost of the application of the control techniques process changes, alternative fuels, etc.

(ii) A system of control which is determined by the State and approved by the Administrator to be adequate to comply with standards of performance for new stationary sources under Part 60 of this chapter may be deemed to constitute best available control technology.

(iii) In the case of sources identified at subparagraph (1)(i)(a) of this paragraph, best available control technology for sulfur oxides shall consist, as a minimum, of a control strategy determined to be capable of complying with standards of performance for new stationary sources specified in Part 60 of this chapter. However, individual analysis of each new or modified source which considers the availability of fuel and the cost and efficiency of other or additional control strategies may result in additional control for individual plants.

NOTE: Under the alternative definition of Best Available Control Technology, as set forth in the preamble, subdivision (iii) would be eliminated.

(7) The owner or operator of a source subject to the provisions of subparagraph (4) of this paragraph shall install, or cause to be installed, a minimum of two continuous ambient air quality monitoring instruments for sulfur dioxide and/or two intermittent ambient air quality monitoring instruments for particulate matter.

(i) The State shall specify which pollutant(s) the source shall monitor.

(ii) When source, meteorological and/or terrain conditions warrant, the State may require additional samplers above the minimum number specified in this paragraph.

(iii) Such systems shall include one site equipped to monitor wind speed and wind direction.

(iv) The instruments shall meet the performance and operating specifications of § 51.17(a)(1) of this chapter.

(v) The locations of such instruments shall be located in areas of expected maximum concentrations determined by meteorological diffusion modeling or best judgment or in any other area specified by the State.

(vi) The instruments shall be maintained, calibrated, and operated in accordance with the methods prescribed by the manufacturer of such instrument(s) and other procedures consistent with good engineering practice.

(vii) The owner or operator of the source subject to this paragraph shall maintain a record of all measurements required by this subparagraph. Measurement results shall be summarized monthly and reported to the State semi-annually, and shall be submitted within 45 days after the end of the reporting period. Reporting periods are January 1-June 30, July 1-December 31, with the [19000] initial reporting period starting as indicated in subdivision (viii) of this subparagraph.

(viii) The continuous monitoring and recordkeeping requirements of this subparagraph shall become applicable six months after initial start-up of the source.

(ix) Information collected pursuant to this subparagraph shall be made available to the Administrator upon his request.

(x) The State may demonstrate to the Administrator that the existing air quality surveillance system in the area in which the source is to be constructed or modified meets the requirements of this subparagraph.

(8)(i) Prior to making the determinations required by subparagraphs (4)(i) of this paragraph, the State shall provide opportunity for public comment on the information submitted by the owner or operator and on the agency's analysis of the effect of such construction or modification on ambient air quality. Opportunity for public comment shall include, as a minimum:

(a) Availability for public inspection, in at least one location in the region affected, of the information submitted by the owner or operator, and the State or local agency's analysis of the effect on air quality.

(b) A 30-day period for submittal of public comment, and

(c) A notice by prominent advertisement in the region affected of the location of the source information and analysis specified in subparagraph (4)(i) of this paragraph.

(ii) Within 90 days from an owner or operator's submission of the information required under subparagraph (5) of this paragraph, the State shall also publicly announce and transmit in writing to the Administrator its determination under subparagraph (4)(i) of this paragraph, together with:

(a) Copies of all information prepared by the State under subparagraph (4)(i) of this paragraph,

(b) A copy of the public notices issued in conformity with subdivision (i) of this subparagraph, and

(c) A statement that the State has complied with the requirements of this paragraph.

(9)(i) The Administrator will notify the State of his determination and reasons for any disagreement under subparagraph (4)(ii) of this paragraph no later than 25 days following the State's submission of the information required under subparagraph (8)(ii) of this paragraph. (ii) The State will notify the owner or operator in writing of the approval or denial to construct or modify a source within 120 days of the owner or operator's submission of the information required under subparagraph (5) of this paragraph.

(10) The Administrator may cancel an approval to construct if the construction is not begun within two years from the date of issuance, or if the construction work is suspended for one year.

(11) Approval to construct or modify shall not relieve any owner or operator of the responsibility to comply with all local, State, or Federal regulations which are part of the applicable plan.

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[31000] *

[Federal Register, Vol. 39, No. 167—Tuesday, August 27,
1974]

ENVIRONMENTAL PROTECTION AGENCY

[40 CFR Part 52]

[FRL 254-4]

APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

Prevention of Significant Air Quality Deterioration

On May 31, 1972 (37 FR 10842), the Administrator of the Environmental Protection Agency published initial approvals and disapprovals of State Implementation Plans submitted pursuant to section 110 of the Clean Air Act, as amended in 1970.

On November 9, 1972 (37 FR 23836), all State Implementation Plans were disapproved insofar as they failed to provide for the prevention of significant deterioration of existing air quality. This action was taken in response to a preliminary injunction issued by the District Court for the District of Columbia Circuit, which also required the Administrator to promulgate regulations as to any state plan which either permits the significant deterioration of air quality in any portion of any state, or fails to take the measures necessary to prevent such significant deterioration.

Accordingly, on July 16, 1973 (38 FR 18986), an initial notice of proposed rulemaking was published which set forth four alternative plans for preventing significant deterioration, and which solicited widespread public involve-

* Bracketed numbers represent the page in the *Federal Register* upon which material following such a number can be found.

ment in all aspects of the significant deterioration issue. Public involvement was considered essential because the issue of what constitutes "significant" deterioration, and what measures should be employed to prevent such deterioration, must be resolved as a public policy issue with full recognition and consideration of its potential social and economic as well as environmental implications. This balancing of the social and economic considerations with the environmental implications is considered necessary to fulfill the mandate of the Clean Air Act to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the *productive capacity* of its population." (Emphasis added)

The specific regulations therein are a modification of the originally proposed area classification plan, and are being repropose to focus attention and solicit comment on the detailed procedural and technical aspects prior to promulgation to correct the deficiencies in State Implementation Plans outlined in the disapproval notice on November 9, 1972. These regulations would be implemented by the States pursuant to the authority contained in the Clean Air Act, as amended. Under the Act the Administrator is authorized to implement and enforce the regulations in cases where States are unwilling to request or accept the delegated authority.

To facilitate development of State plans to implement the general policy set forth in these regulations, in the near future the Administrator intends to publish guidelines for the preparation, adoption, and submittal of State Implementation Plan provisions with respect to the prevention of significant deterioration (40 CFR 51). These additional guidelines will provide criteria for submission of State plans to prevent significant deterioration. The State plans need not be identical to the regulations proposed herein, but should be developed to accommodate more appropriately individual conditions and procedures unique

to specific State and local areas. States are urged to develop and submit individual plans as revisions to State Implementation Plans as soon as possible. When individual State Implementation Plan revisions are approved as adequate to prevent significant deterioration of air quality, the applicability of the regulations proposed herein will be withdrawn for that State.

ORIGINALLY PROPOSED ALTERNATIVES

In the July 16, 1973, notice of proposed rulemaking (38 FR 18986), the Administrator proposed four alternative plans to prevent significant deterioration of air quality. These plans were intended to define the range of reasonable approaches to the problem and stimulate discussion on appropriate courses of action. The four proposed alternative plans were:

Air Quality Increment Plan—This plan would have prevented significant deterioration of air quality through application of a single nationwide incremental increase in concentrations of total suspended particulate (TSP) and sulfur dioxide (SO₂) over those levels which existed in 1972. The sizes of the increments were selected to balance reasonable economic growth with minimal environmental deterioration.

Emission Limitation Plan—This plan would have limited total emissions of TSP and SO₂ over a relatively large area and indirectly prevented the significant deterioration of air quality. This plan offered some flexibility to States to distribute emissions throughout the area over which the emissions were to be limited.

Local Definition Plan—This plan would have prevented significant deterioration by requiring local determination, on a case-by-case basis, of the significance of the air quality impact of major new sources. This plan recognized the variability between areas and called for a subjective de-

cision making procedure to be implemented at the local level.

Area Classification Plan—This plan called for the establishment of "zones" of different allowable incremental increases in TSP and SO₂. "Zone I" allowed for a very small incremental increase which would permit almost no new heavy industrial growth using current technology. "Zone II" used the same increment as in the Air Quality Increment Plan and allowed for what the Administrator considered a reasonable mix of well planned and sited construction. The plan also included provisions wherein individual areas could experience deterioration up to the national standards. At the time of proposal the Administrator recognized that this plan appeared to be superior to the others.

All four proposed plans would have been implemented through a preconstruction review of sixteen specified source categories to determine whether or not these sources would cause a violation of the constraints of each plan. Also, each plan called for application of best available control technology on all new sources covered by the regulations.

ACTIVITIES SINCE PROPOSAL

The proposal to prevent significant deterioration of air quality has stimulated a considerable amount of interest throughout the country. To encourage a complete dialogue, the Administrator initiated several subsequent activities to evaluate more fully the broad range of social and economic implications involved. Among the principal activities undertaken were:

Public Hearings—Public hearings were held in Washington, D.C. on August 27, 28, and 29; in Atlanta, Georgia on September 4 and 5; in Dallas, Texas on September 5 and 6; in Denver, Colorado on September 5, 6, and 7; and

in San Francisco, California on September 5 and 6. Over 160 people made presentations at these hearings, and the hearing records are available for inspection at the Freedom of Information Office, Environmental Protection Agency, 401 M Street, S.W., Washington, D.C.

Public Comments—A 90-day public comment period was conducted during which over 300 written comments were received. Many of these comments were quite detailed, and demonstrated a great deal of understanding and concern within both the private and industrial sectors. All public comments received are available for inspection at the Freedom of Information Office.

Additional Consultations—Because of their involvement with and special understanding of the difficult problems related to implementation of any policy to prevent significant deterioration of air quality, the Administrator and his staff have consulted with a variety of individuals and groups which have a special interest in, or knowledge of, the pertinent factors associated with these regulations. Included in these consultations have been State governors and their official representatives, mayors and their official representatives, representatives from local governmental agencies, members of Congress and Congressional staff members, State and local air pollution control officials, representatives of environmental groups, representatives of industry and commerce, and officials of other Federal agencies.

The Administrator feels that the outcome of these efforts has been to stimulate a complete, open and frank dialogue on all aspects of the issue of significant air quality deterioration. As stated in the proposed rulemaking, there is perhaps no other environmental issue that imposes [31001] upon the Administrator a greater obligation to develop fully all points of view and relevant facts. The review of public comments and hearing testimony, the

extensive consultations, and the many additional studies and analyses undertaken and evaluated have resulted in valuable information which has been used in formulating the regulations proposed herein.

These regulations are in the form of a proposal because, due to the lack of precise direction either in the Clean Air Act or in the Court order, the thrust of the initial proposals was to focus on the conceptual basis for regulations. The comments received on the proposed regulations therefore tended primarily to discuss conceptual issues such as the roles of federal and state/local governments, rather than detailed comments regarding implementation of the regulations. Accordingly, the Administrator feels that a reappraisal of the regulation enclosed herein is essential to properly explore all aspects of this issue and to focus more clearly on procedural and technical issues. The Administration has submitted for consideration an amendment to the Act which would eliminate this requirement. This amendment is pending before the Congress. Although EPA does not agree with this amendment, EPA urges that it be given the fullest consideration and proposes the present regulations at this time without any intent to delay or influence such full consideration. The proposal herein is necessary because the Court has ruled that the current Clean Air Act requires the Administrator to prevent significant deterioration, and this requirement must be met even though it is possible that Congress may provide additional guidance and/or legislative changes in the future.

CONCEPTUAL CONSIDERATIONS

In the notice of proposed rulemaking, attention was drawn to the fact that any plan to prevent significant deterioration of air quality might have a major influence on land use patterns in many areas of the country. The development of proper land use planning to ensure protection of the environment is one of the most important tasks

yet to be undertaken. Comprehensive land use planning is a complex process including many variables, only one of which is air quality. Development of land use plans in which air quality represents a single overriding criterion is not, in the Administrator's judgment, a desirable course of action for most areas. The regulations proposed below are therefore designed to inject consideration of air quality as one of many constraints on land use decisions, but not to mandate land use decisions based solely on air quality. In this regard, the "significance" of any air quality deterioration is defined in terms of the proper and desired use of an area as well as the magnitude of pollutant concentrations. The intent is not to restrict or prohibit economic growth, but rather to ensure that desirable growth is planned and managed in a manner which will minimize adverse impacts on the environment.

As was pointed out in the initial proposed rulemaking, determination of that level of deterioration which constitutes "significant" deterioration is basically a subjective decision, because the primary and secondary National Ambient Air Quality Standards are required to be protective of all known adverse effects on public health and welfare in a nationwide context. Response to the initial proposed rulemaking confirmed that consideration of varying social, economic, and environmental factors in different areas would result in varying definitions of what constitutes significant deterioration. None of the information received during the public comments period would enable the Administrator to justify any but a subjective method for defining when increases in the concentration of pollutants become "significant." Strong sentiment was expressed at public hearings, in written comments, and during consultations that States and localities should be given the maximum degree of flexibility in making judgments as to when increases in concentrations become "significant,"

because the judgments must be based on considerations which vary from locality to locality.

Stemming from concern over the impact of regulations to prevent significant deterioration on land use patterns, and the necessarily subjective nature of any determinations in this regard, the roles of Federal, State and local governments are very important. Any policy to prevent significant deterioration involves difficult questions regarding how the land in any area is to be used. Traditionally, these land use decisions have been considered the prerogative of local and State governments, and in the regulations promulgated herein, the primary opportunity for making these decisions is reserved for the States and local governments. The States, acting pursuant to federal regulations, would exercise the authority to prevent significant deterioration of air quality, and this authority could be delegated to the local level if desired. In the Administrator's judgment, this matter normally should not be handled at the Federal level, but should become a matter for discussion and decision making at a governmental level in close contact with the area. However, if States are unwilling to accept this delegation of authority, the Administrator is prepared to implement and enforce these regulations in order to prevent significant deterioration of air quality. Further, even in cases where States fully accept the delegated authority, the Administrator may review, within very narrow limits, certain decisions made pursuant to these regulations.

The Clean Air Act places primary responsibility for the prevention and control of air pollution on the States and local governments. Accordingly, several broad options are available to States in designating an agency to exercise the authority which would be exercised pursuant to these regulations. One option would be to place responsibility for these regulations in a State-level agency; another option would be to assign responsibility to appropriate units

of local government; a third would be to assign responsibility to a regional planning or multi-functional agency.

Because of the impact these regulations may have on land use, the Administrator encourages the States, wherever possible, to delegate substantial authority under these regulations to appropriate local governmental units. Such delegation should be subject to appropriate conditions (such as effective and coordinated review on the appropriate regional scale, citizen involvement, ultimate control by general purpose local governments, etc.). Additionally, the Administrator encourages States to allow local general purpose governments, subject to similar conditions, to request designation of a local government body as the reviewing authority. If a State chooses to exercise authority at the State level, the Administrator encourages States to consult with all effected local governmental units carrying out these regulations. However, the Administrator emphasizes that the ultimate responsibility for assuring successful implementation of these regulations would lie with the State; if a State cannot or does not desire to implement the regulations herein, the Administrator would perform or delegate these responsibilities.

Because of the many inherent interrelationships between State efforts to prevent significant deterioration of air quality under these regulations and other state activities related to planning for land use, development, and environmental quality, special efforts to enhance intergovernmental coordination must be effected in each state. The regulations require consultation between the agency designated by the Governor to implement this effort and other relevant agencies. If the unit designated is not an air pollution control agency, the designated unit must consult with the air pollution control agency; similarly, if the designated unit does not have continuing responsibilities for land use planning, it must consult with the appropriate state and/or local land use planning agencies. In this

context, "land use planning agency" is to be construed quite broadly to include economic development or regional planning entities whose activities and responsibilities are appropriate to the specific decisions being made under these regulations.

Furthermore, coordination among other planning procedures, requirements, and agencies is encouraged to the maximum extent possible, particularly with respect to designation or re-designation of areas under these regulations. In particular, the agency designated by the Governor in carrying out its area classification responsibility should ensure coordination with the following four processes as appropriate to the specific state/local setting:

An Air Quality Maintenance Plan and its decision-making procedures.

An areawide waste treatment management unit created under Section 208 of [31002] the Federal Water Pollution Control Act (FWPCA).

The A-95 Review Process.

The Environmental Impact Statement under the National Environmental Policy Act (or equivalent State requirement).

Many areas designated Class III under these regulations would have the potential to exceed national ambient air quality standards during the 1975-1985 period. This will require that they be designated Air Quality Maintenance Areas (AQMA's). In these areas coordination between implementation of these significant deterioration regulations and the Air Quality Maintenance Plan effort will be particularly important.

Section 208 of the FWPCA provides for designation of certain portions of a water basin as requiring areawide waste treatment management. These are areas having a water quality control problem that cannot be alleviated

without an areawide approach aimed at integrating controls over municipal and industrial waste water, storm sewer runoff, nonpoint source pollutants, land use, and growth. The 208 planning agency must be a representative organization whose membership includes but is not limited to elected officials of local governments having jurisdiction in the planning area. Activities of these agencies involve projections of land use and growth patterns and control over new growth as necessary to ensure attainment and maintenance of water quality standards. Their decisions may affect locations of the 19 source categories covered in these significant deterioration regulations. Concepts and approaches developed in such water planning/land use analyses should be related to appropriate decisions in the significant deterioration effort.

The review process established under Office of Management and Budget Circular No. A-95 provides a structure for coordinated planning by strengthening communication among different agencies and governmental levels. This review process has potentially wide applicability through State, regional, and metropolitan clearinghouses that administer the review and comment process. The A-95 process can be regarded as a step toward regional comprehensive planning. Although the A-95 process is required when Federal grants and funds are involved, it could be utilized as an appropriate structure for inter-governmental coordination during the area classification and reclassification phases of implementing these regulations.

Section 102(2)(c) of the National Environmental Policy Act of 1969 requires an Environmental Impact Statement (EIS) to be filed with the Council on Environmental Quality by Federal agencies proposing major projects. The relationship of the proposed action to land use plans, policies, and controls in the project area and how conflicts with Federal, State, and local land use have been resolved must be discussed. Although an EIS is only required with

respect to major Federal actions, some State laws impose similar requirements on private developments. Twelve States and Puerto Rico have adopted broad requirements for EIS's on State actions; similar requirements have been under consideration in another 21 States and the District of Columbia. State EIS requirements are, for the most part, modeled on section 102(2)(c) of NEPA. However, significant differences exist from State to State. Some apply EIS's to local, as well as to State agencies; some require EIS's for private actions for which a government permit is required. Federally required EIS's are coordinated through the appropriate State, regional, or metropolitan A-95 clearinghouses discussed above. The EIS process may be useful in State decisions on the merits of re-classifying an area.

TECHNICAL CONSIDERATIONS

Potential Economic Impact. The requirement to prevent significant deterioration does not mean that economic growth of undeveloped areas must be arbitrarily restricted. Several studies by EPA and other Federal agencies, and additional data contained in public comments, evaluated various aspects of the proposed plans. The studies were characterized by two basic approaches: analysis of impact in specific prototype regions, and analysis of impact on isolated new industrial and energy-related sources. Copies of the analyses and contract reports are available for public inspection at the EPA Freedom of Information Office.

Based on these studies, the Administrator has concluded that the restrictions on deterioration of air quality proposed for Class II areas in the regulations herein would be unlikely to prevent what, in the Administrator's judgment, represents most forms of normal growth and economic development, provided that reasonable siting practices and pollution control measures are employed. How-

ever, unusually high growth urban areas, and some large industrial operations, could be adversely impacted if constrained by the increment of the original Air Quality Increment Plan. In many areas, the limitations proposed under the original Emission Limitation Plan could adversely restrict economic growth: this restriction would be most severe for coal-fired power plants. However, it must be emphasized that results of analyses such as these are sensitive to the assumptions made as to individual site locations, facility configuration, meteorological conditions, etc., and changes in these assumptions for any specific analysis could result in major changes in the results.

Many public comments expressed concern that any regulations to prevent significant deterioration of air quality inherently must have a major adverse impact on all forms of growth and economic development, especially in regard to the development of energy-related sources. However, the available analyses have confirmed that the incremental increases in concentration allowed under the Air Quality Increment Plan (Similar to Class II in the regulations proposed herein) would not necessarily create this adverse impact under most conditions, although in the regulations proposed herein, the 3-hour increment for sulfur dioxide has been increased to ensure that it is no more stringent than the 24 hour increment for large point sources under most meteorological and terrain conditions.

Subsequent to the close of the formal comment period on the original proposal, concern was expressed by the Department of Commerce and the Federal Energy Administration regarding the appropriateness of the Class II increments, particularly to the extent that the Class II increments might restrict construction of new coal-fired power plants and other economic growth in Class II areas. The Class II increments have been established at a level such that, in the judgment of the Administrator, deterioration above that level would constitute a significant deteri-

oration in most areas of the country. With reference to coal-fired power plants, the increments would normally permit construction of new power plants with capacities ranging up to approximately 1000 megawatts, although there would be wide variations in the actual limiting capacity due to the wide variations in terrain and meteorological conditions. Because the average capacity of new coal-fired power plants is projected to be approximately 1000 megawatts (the average size of existing plants is approximately 300 megawatts) the Administrator continues to believe that the level of the Class II increments is appropriate: This level would require that new plants of greater than average capacity normally be located only in Class III areas. Further, typical coal gasification facilities, oil shale processing facilities, and petroleum refineries would not be expected individually to exceed the Class II increments in most areas. However, large concentrations of new industrial sources and large new pollution-prone facilities, particularly those which may lead to new development in the vicinity, would in many cases be permitted only in Class III areas under the regulations proposed herein. The Federal Energy Administration, the Department of Commerce and the Treasury Department have specifically suggested that the incremental levels set forth in the proposed regulations be doubled, and that doing so would still adequately protect Class II areas against significant deterioration. Due to the concern so expressed, the Administrator specifically solicits comments on the desirability of increasing the level of the Class II increments proposed herein.

The Department of Health, Education, and Welfare has expressed two major concerns about the enforcement of air quality levels more stringent than the existing primary and secondary ambient standards. First, it fears adverse health impacts if metropolitan areas which now exceed even the primary standards are delayed in their attain-

ment of those standards by their inability to shift pollution sources to outlying areas. Second, the Department is concerned that a disproportionate share of the costs and few [31003] of the benefits of the non-deterioration policy would accrue to persons of limited economic means and residential mobility. These persons would be particularly vulnerable to such adverse impacts as curtailed economic growth, altered urban and rural development trends, constrained national capacity to absorb anticipated population increases, and higher prices for energy and manufactured goods. These impacts could compound the difficulties faced by all levels of government in responding to the needs of the poor, the elderly, racial minorities, and persons otherwise disadvantaged. The Administrator recognizes the concern expressed by the Department of Health, Education, and Welfare that adverse impacts could accrue to persons of limited economic means and residential mobility. Specific comments are solicited on this issue, with emphasis on any factual data relative to the issue. However, it is emphasized that there is no feature in these proposed regulations which would authorize any delays in attainment of the national standards in any area, irrespective of how that area, or any other area, would be classified under these proposed regulations.

Data Considerations. The following information is based on data collected by EPA and supported by public comment. The background information to support these conclusions is available for inspection at the EPA Freedom of Information Office.

1. *Measurement Accuracy:* Although the federal reference method for suspended particulates is adequate for use in measuring the extremely small increments often associated with prevention of significant deterioration, the federal reference methods for other criteria pollutants at low (clean environment) concentrations suffer varying degrees of inadequacy in that the precision of the current

methods is not adequate to reliably distinguish between readings approaching the small increments proposed. For example, if a twenty-four hour reading for sulfur dioxide were $100 \mu\text{g}/\text{m}^3$, the actual twenty-four hour average can be expected to lie between $53 \mu\text{g}/\text{m}^3$ and $147 \mu\text{g}/\text{m}^3$, which is comparable to the $100 \mu\text{g}/\text{m}^3$ increment proposed in the Air Quality Increment Plan. Extensive modification of existing methods, or development of new measurement technology, would be required in order to precisely measure the increments as proposed. However, current instrumentation would be adequate to calibrate and improve current diffusion modeling techniques and to measure compliance with ambient air quality standards.

2. *Air Quality Data:* Monitoring data on suspended particulate concentrations are the only data extensive enough in clean areas to support meaningful analyses. The major conclusion which can be drawn from these data is that vast numbers of measurements would be required to precisely determine a baseline level, and then further extensive measurements would be required to establish any degree of deterioration from that level.

3. *Data Variability:* Normal random variations in pollutant concentration in clean areas, especially for particulate matter, are often of greater magnitude than the incremental increases proposed for use under the original Air Quality Increment Plan. For example, the 1968 maximum concentration at the Grand Canyon for particulates was $126 \mu\text{g}/\text{m}^3$ and the annual average was $31 \mu\text{g}/\text{m}^3$. In 1969 the maximum concentration was $32 \mu\text{g}/\text{m}^3$ and the annual average was $17 \mu\text{g}/\text{m}^3$. These differences were caused by random variations due primarily to normal meteorological factors, and exceed the allowable air quality increments proposed in the original Air Quality Increment Plan.

4. *Modeling and Simulation Accuracy:* Current diffusion modeling techniques, when uncalibrated and used in the

absence of baseline air quality data, can exhibit random errors as high as a factor of two for short term concentrations and a factor of 1.5 for annual averages when compared with known concentrations of pollutants. It should be noted that in assessing most average concentrations, particularly those resulting from multiple sources, significantly better accuracy can be obtained. However, this is not the type of application normally associated with the significant deterioration concept which calls for pre-construction review of individual new sources. It should also be noted, however, that data obtained from current diffusion modeling techniques, while not corresponding to actual conditions in the ambient air, do provide a consistent and reproducible guide which can be used in comparing the relative impact of a source.

Based on these factors concerning the reliability of available field instrumentation and the normal variability of air quality data, it is the Administrator's judgment that a measured incremental increase in concentration over a measured baseline normally cannot be used as the criterion in assessing the significance of a new facility's impact on air quality. However, the use of diffusion modeling as an indicator of a source's compatibility with the land use desires of an area is a valid use of such models.

Most public comments concurred that measured data should not be used as the sole criterion for assessing the incremental increase. Some comments have disputed it, but a review of studies cited in those comments has shown that the measurement methods employed in these studies are quite complex and expensive, and require highly skilled operators and subsequent detailed analysis. These procedures are not currently suitable for the type of widespread field use required to prevent significant deterioration on a nationwide basis.

SUMMARY OF REGULATIONS

The regulations proposed herein represent a modification to the Area Classification Plan as proposed in 38 FR 18986. As proposed, the regulations incorporate four basic features:

1. Provisions are made whereby areas would be designated under three classifications: Class I applies to areas in which practically any change in air quality would be considered significant; Class II applies to areas in which deterioration normally accompanying moderate well-controlled growth would be considered insignificant; and Class III applies to those areas in which deterioration up to the national standards would be considered insignificant.

2. The impact of a proposed new source on the applicable "deterioration increment" would be assessed through conventional new source review procedures (i.e., a pre-construction review) applied to proposed facilities in nineteen specific major source categories. The impact of smaller sources and area sources would be included in the "deterioration increments" at the time of review for construction or expansion of one of the specified source categories.

3. The "deterioration" increments in Class I and II areas are firm ceilings which cannot be exceeded by any new major source. However, procedures are included so that areas, both large and small, can be reclassified to allow introduction of sources not compatible with the initial classification, in cases where it is determined that the resulting deterioration would not be "significant".

4. Although the determination of what constitutes "significant" deterioration is intended to be made by the State under these regulations, the Administrator retains review authority over certain State actions.

The regulations as proposed herein take the same general form as the proposed Area Classification Plan, and

in the subsequent discussion only the major changes are emphasized.

Sources Subject to the Regulations. The list of sources subject to review has been expanded to include three additional source types—fuel conversion plants (such as coal gasification and oil shale plants), primary lead smelters, and sintering plants. The requirement for review of all sources with potential emission rates in excess of 4,000 tons/year has been deleted because the requirement generally is superfluous.

It is important to note that in this type of approach it is not possible to conduct a pre-construction review of each small source (such as a private home), but rather to concentrate the effort on the important large sources. These regulations do not require pre-construction review of sources other than those specifically listed, but require that these large sources, for which pre-construction review will be carried out, consider the impact of small sources constructed since the effective date of these regulations in determining their incremental impact and comparing it to the allowable increment. This provision is not intended to restrict the activities of States in development of their own source lists for State plans to prevent significant deterioration.

The term "expanded source" has been defined in these regulations in order to avoid possible confusion with the more commonly used term "modified source". [31004] An expanded source is defined as one which intends to increase production through a major capital expenditure. This term deliberately excludes from review under these regulations any fossil fuel-fired electric power plant which increases emissions solely due to switching from a low sulfur to a higher sulfur content fuel. Fuel switching by power plants is being adequately handled under existing federal and state controls, and to impose additional federal controls on these plants would be inconsistent with the recently

enacted Energy Supply and Environmental Coordination Act.

The Energy Supply and Environmental Coordination Act of 1974 was not intended to resolve the significant deterioration issue. Nevertheless, it was intended to permit a mechanism by which EPA's Clean Fuels policy could be implemented to the extent that States agreed to do so. Accordingly, it would be inappropriate for these proposed regulations to inhibit fuel switching due to a federally imposed "Deterioration Increment," even though all States would have the opportunity to reclassify to a higher classification. It should be noted, however, that States generally do retain the option to inhibit or prevent fuel switching at their discretion.

In actual practice, the regulation proposed herein would permit a power plant which switches fuel to "use up" the entire available deterioration increment, and in some cases exceed the increment, thereby precluding introduction of other major sources in the area unless the area is reclassified.

Area Classification Procedures. The concept of classifying increases in air quality has been only slightly modified from the earlier proposal. The allowed incremental increases in Class I areas are identical to those in the proposed "Zone" I. The allowed increases in Class II areas are similar to those of the proposed "Zone" II. The 3-hour increment has been increased to insure that it is no more stringent than the 24-hour increment under most meteorological and terrain conditions. A Class III area has been specified to formalize the "exception" procedures of the proposed plan. The terminology has been changed from "zoning" to "classification" to avoid confusion with conventional zoning concepts. Under conventional practices, a zone is a relatively small area (e.g., a city block or portion of a county). An area classified

under the regulations herein initially would be a much larger area, often consisting of, as a minimum, several large counties. Initial classification of smaller individual areas does not appear feasible because the carryover of pollution from one small area to another could not be adequately controlled.

A Class I designation would involve those areas where almost no change from current air quality patterns is desired. Class II designation would indicate areas where moderate change is desirable but where stringent air quality constraints are nevertheless desired. Class III designation would indicate areas where major industrial or other growth is desired and where increases in concentrations up to the national standards would be insignificant. The basic purpose of this classification procedure would be to require a conscious decision, made publicly with public input, that the intention of the State and the desire of the local population is to provide for the general type of air quality implied by the classification.

The enclosed regulations would designate all areas of Class II effective upon promulgation. Individual States will have sufficient authority to redesignate any area without need for specific new State enabling legislation. Areas may be redesignated as Class I, II or III by the State (or Federal Land Managers or Indian governing bodies as appropriate), provided that at least one public hearing, at which facts relevant to the area's classification may be presented, is held in the area affected and the Administrator is provided with a summary of the information presented at the public hearing. These designations can be accomplished at any time, and can be modified subsequently by the State in the same manner they were set.

States would be encouraged to perform appropriate redesignations as soon as possible. The initial designation as Class II is intended to represent only a tentative de-

termination of what significant deterioration means in most areas, and is subject to a further determination—which only the States can appropriately make—concerning the economic and other factors that may justify a somewhat different level of deterioration as being “significant.”

The Administrator would normally approve any redesignation except in the following four cases: (1) where the required procedures were not followed; (2) where the decision was based on inaccurate technical data; (3) where the redesignation authority has arbitrarily and capriciously disregarded relevant environmental, social or economic considerations; or (4) where a State is unwilling to implement the new source review procedures specified in these regulations. There are no limits on how often an area can be redesignated.

For redesignations of Federal or Indian lands, the normal procedures for States would be modified to be consistent with divisions of authority among Federal, State and Indian governing bodies. Nothing in these regulations would convey authority to States over Federal or Indian lands where such authority is not already present in other statutes, but it is anticipated that cooperative procedures will be developed among interested parties to implement these regulations.

Areas should be considered for redesignation as Class I in cases where the location of any polluting industry within the area is inconsistent with current or planned uses for the area, or where it is desirable to protect the area from any further deterioration because it is one of exceptional scenic or recreational value or is ecologically fragile, or where no further major industrial growth is desired irrespective of the existing air quality.

Although the increments for Class II are larger than for Class I, the allowable deterioration associated with a

Class II designation is minor, and the Class II air quality increments are smaller than the random variations in air quality which are normally caused by natural (predominately meteorological) factors. These Class II increments are sufficiently small that they preclude introduction of certain major sources of air pollution, although they do not permit introductions of what the Administrator has determined generally represents a reasonable amount of well planned and controlled industry so long as the individual facilities are not unusually large, or are not clustered in one small area.

Areas should be considered for redesignation as Class III where they are intended to experience rapid and major industrial or commercial expansion (including areas in which extensive mineral development is desired), but only in cases where the resulting air quality deterioration would not be considered "significant". In many cases, areas (or portions of areas) which are redesignated as Class III can be expected to satisfy the criteria for designation as an Air Quality Maintenance Area. However, States must ensure that proper consideration is given to maintenance of the national standards in all areas, irrespective of the specific definition given to "significant" deterioration.

It is important to recognize that the area classifications do not necessarily imply current air quality levels or current land use patterns. Instead, the classifications imply the desired degree of change from current levels and patterns. Accordingly, Class III could be applied to a currently pristine area, and Class I could be applied to a less clean area.

The regulations are structured to permit very large areas to initially be redesignated uniformly. The desire for relatively small localities to depart from the general criteria of the surrounding area to allow construction of individual sources which could exceed the incremental in-

creases can be accommodated through the flexibility of the reclassification procedures.

These regulations do not impose new requirements on sources proposed for construction in areas designated as Class III. In these areas, the existing procedures for attainment and maintenance of national standards are intended to prevent "significant" deterioration. Since sources in Class III areas are not subject to review under these regulations, States should take care in their redesignation procedures to ensure that Class III areas are sized and situated in such a manner so as to prevent carryover into adjoining areas which are intended to be restricted to Class I or Class II increments.

Source Review Procedures. Introduction of specified new sources, or major expansion of existing sources, are prohibited in Class I and II areas unless: (1) Best Available Control Technology will be applied on those sources for which new source performance [31005] standards are not applicable, and (2) the applicable increments will not be exceeded. If the air quality impact of a new source plus the impact of all other developments since the date of promulgation is expected to exceed the incremental increase allowed by the area designation, the source must either be denied a permit to construct or, if it is determined that the resulting deterioration would be insignificant in view of the social and economic benefits of the source's construction, the area affected by the source's emissions may be redesignated to a higher numeric designation. Under no circumstances, regardless of the classification of the area, would the regulations permit the approval for construction of a source which may interfere with the attainment of maintenance of any national standard.

In the case where proposed Federal or Indian facilities require review under these regulations, the Administrator

will normally retain review responsibility and will consult with the State as appropriate.

Procedures for Maintaining the Increment. The regulations proposed herein specify 1973 air quality, with appropriate adjustments to account for sources approved or constructed prior to promulgation, as the baseline. It is necessary to use 1973 air quality data because later data are not yet available in complete form. However, the availability of actual baseline data in relatively clean areas is of secondary importance in these regulations. As discussed previously, current air quality measurements taken in clean areas show large random variations, and it is unclear how a measured baseline could be meaningful in view of these large random variations in background concentrations.

In actual practice, although the regulations do not specifically preclude the use of measured air quality as a method for assessing the available increment, it is anticipated that assessment of the available increment will normally be accomplished through an accounting procedure whereby modeling results for individual sources will be used to keep track of the available (or "unused") increment as sources and emissions are increased or decreased. Therefore, an accurately measured baseline is not an essential consideration in implementing these regulations although the concept is retained for use in those few situations where it may be desired.

It should be noted that the deterioration increment is conceptually applied to the air quality levels existing on the date of promulgation rather than to a level existing at some time in the past (e.g., 1970 or 1972) as was considered in the original proposal. The effect of prior control activities in the area does not constrain the options available for either restricting or encouraging economic growth: These considerations are incorporated in the sub-

jective decisions which must be made during the area classification deliberations.

Air Quality Monitoring Requirements. In the originally proposed plan, all new major sources were required to conduct air quality monitoring in their vicinity. This was an essential feature because the proposed plan required that accurate air quality information be available in order to assess the "significance" of subsequent sources.

Under the regulations proposed herein, there is no similar need for such precise air quality information, because the air quality assessment is based primarily upon pre-construction modeling results. Although additional air quality data are nearly always of value, there is no justification for requiring sources to conduct monitoring under these proposed regulations. Therefore, the monitoring requirement has been deleted.

It should be noted that the impacts of sources which are not subject to the review procedures are not necessarily reviewed unless a major source proposes to locate in the area. This feature is necessary because the impact of the very large numbers of very small sources could only be assessed by either modeling or air quality measurement. To model each individual source during an individual pre-construction review would be an extremely laborious task, and the end result would be of questionable accuracy. If air quality measurement were attempted the combination of measurement inaccuracies and random variability in background concentrations would normally mask the effects of the sources of interest. Therefore, the regulations consider the air quality impact of relatively small sources only in conjunction with the impact of large sources which are proposed for construction.

Best Available Control Technology. In the original proposal, two alternative definitions of Best Available Control Technology (BACT) were discussed. Under both

alternatives, a case-by-case review to determine BACT was required of each source for which new source performance standards were not applicable. Under the first alternative, the attainment of NSPS was determined to be equivalent to application of BACT for all sources except for sulfur dioxide emissions from fossil fuel-fired steam electric power plants; for these plants a case-by-case review was required to determine if emissions could be reduced to below NSPS. Under the second alternative, fossil fuel-fired steam electric power plants were treated like all other sources for which NSPS are applicable.

In the regulations proposed herein, the second alternative is incorporated: power plants would not be subjected to the special BACT review because requiring such a review might arguably be inconsistent with the Congressional intent of requiring national standards of performance for new sources. Further, the requirement for application of BACT for control of hydrocarbons, oxides of nitrogen, and carbon monoxide has also been deleted because this requirement was inconsistent with the restriction (explained below) of these regulations to particulate matter and sulfur dioxide.

Procedures for Resolving Jurisdictional Disputes. In the notice of proposed rule-making, it was noted that the regulations could result in inequitable growth potential along State boundaries because a source approved for construction in one State could "use up" much or all of the growth potential of another. The transport of pollutants across State lines was a major issue raised by the States which filed amicus curiae briefs in the original litigation.

The regulations herein would require that a State notify an adjacent State at any time that it is reviewing a proposed source which could affect air quality in the adjacent State. It is anticipated that States will arrange bilateral and multilateral procedures to resolve differences. It is

not appropriate to place the Administrator in the role of arbitrator in interstate disputes because he would have no criteria on which to base his decisions. The Environmental Protection Agency can and will provide technical assistance and make findings of fact; but, if the differences cannot be resolved, relief should be sought through the courts. The 1972 Supreme Court decision in *Illinois vs. City of Milwaukee* may provide a particularly effective mechanism for resolving such interstate differences. The court held that the Federal District Courts would apply a Federal "common law", based on equitable "nuisance" principles, to require one State to terminate unreasonable pollution affecting another.

Effective Date for Source Review. The initial proposals stated that the regulations would be effective as of the date of initial proposal. It has become apparent that such a date would place an inequitable burden on sources which had commenced construction during the period from July 16, 1973 (the date of initial proposal) to the actual promulgation, because during that time these sources have had no knowledge regarding which of the alternative plans would be promulgated, and hence have had no knowledge of the criteria which would be imposed.

The regulations herein would be effective upon promulgation, but apply only to sources for which construction or expansion is commenced after six months subsequent to the date of promulgation. For these regulations, "commenced" is given the same definition as in 40 CFR 60 concerning applicability of New Source Performance Standards.

The intent of this provision is to avoid severe disruption of sources which are in the final planning and review process at the time of promulgation. If the regulations were applied to these sources they would be required, in many cases, to re-plan and re-enter the review process to comply with the significant deterioration criteria, and it

is considered unlikely that any major environmental benefits would be gained. Additionally, the regulations require rather extensive review procedures to be developed either by the States or by EPA, and the requirement to delegate the Administrator's authority to those States which are willing to implement these regulations directly will also require time. Accordingly, the six-month time period is intended to allow [31006] sufficient time to initiate and develop adequate review procedures, and actually accomplish the necessary review, without imposing a moratorium on construction of new sources.

DISCUSSION OF ADDITIONAL PUBLIC COMMENTS

Substantial public comment was received suggesting that the proper course of action would be to request legislative relief from the Congress, i.e., remove from the Clean Air Act the basis for the Court's finding of a requirement to prevent significant deterioration of air quality. Congressional debate and consideration of this issue is currently underway, and will continue; however, the Courts have ordered the Administrator to prevent significant deterioration under the Clean Air Act as presently enacted, and the regulations proposed herein are intended to accomplish that objective in a manner which is in the best interest of the public.

Substantial public comment was also received indicating that additional pollutants (specifically the "automotive pollutants") should be included in the regulations. After careful consideration of the arguments, the Administrator has concluded that ongoing programs are adequate to prevent any significant deterioration due to sources of carbon monoxide, hydrocarbons or nitrogen oxides for the following reasons:

First, the Federal Motor Vehicle Emission Standards are expected to result in sizeable reductions in emissions of

those pollutants on an area-wide basis for many years into the future.

Second, a basic requirement for sources under the enclosed concept is the application of Best Available Control Technology (BACT). This level of technology is already required on automobiles in order to comply with the Motor Vehicle Emission Standards, and further actual area-wide emission reductions under the enclosed regulations would be impractical.

Third, carbon monoxide has no identifiable or noticeable effects at concentration levels below the current standards. Unlike TSP and SO₂, it has no observable esthetic impact. Since there are no suspected effects at levels below the standards, it is not reasonable to consider those levels to be "significant."

Fourth, hydrocarbons and oxides of nitrogen are precursors to photochemical oxidants and nitrogen dioxide, but the transformation from the former to the latter takes place over a relatively long time period. It is possible for local concentrations of vehicular activity to result in increased localized emissions of hydrocarbons and oxides of nitrogen, but by the time these emissions are transformed into photochemical oxidants and nitrogen dioxide, the resultant pollutants would be dispersed over a wide area. The motor vehicle emission standards are intended to reduce area-wide concentrations of these pollutants, and no areawide significant deterioration is expected to result from localized increased vehicular activity [i.e., the effect of areawide emission reductions would overwhelm any effect of localized emission increases except as already provided for in the indirect source regulations (38 FR 15836, 39 FR 7270)]. Further, the source-receptor relationship of these pollutants is difficult to define in other than highly urbanized areas, particularly when only a single isolated source is involved, and hence the procedures appropriate

for analysis of SO_2 and TSP would be inappropriate for analysis of hydrocarbons and oxides of nitrogen. However, it may become desirable to control deterioration due to these pollutants, as well as due to possible additional pollutants for which national standards might be set in the future: If this occurs, appropriate revisions to these regulations would be made.

Other Plans Proposed. Some of the public comments received contained alternative proposals by which significant deterioration could be defined and prevented. Most of these proposals were relatively minor variations on one or more of the four proposed alternatives. However, a few groups developed comprehensive plans which differed in concept from the plans proposed by the Administrator.

1. *The Sierra Club Plan.*—The Sierra Club and many other environmental groups advocated a volume averaging approach in which concentrations of pollutants are limited not by ground level measurements, but rather by an average concentration through a spherical space measured within a one kilometer radius from the top of the stack. This plan represents an entirely different concept from the approach used for attainment and maintenance of ambient air quality standards and would require implementation of a unique set of procedures.

As discussed in preceding sections, current air quality monitoring techniques are marginally accurate at low ground level concentrations. The monitoring required by the Sierra Club plan is even less precise, requiring instrumented aircraft and remote sensing devices which are currently of very limited availability. The diffusion modeling required by the proposal in very clean areas is relatively simple. However, in multiple source areas where it would be desired to take into account emissions from existing sources, the capability does not exist to perform the type of modeling required.

In addition to the difficulties of implementing a volume averaging plan such as proposed by the Sierra Club, the economic impact of the Sierra Club plan would be extremely severe. The type of control technology assumed by the plan's authors is not generally available, and will not be available in the near future. Use of the Sierra Club plan would greatly inhibit increased utilization of U.S. coal reserves and could possibly, through restrictions on emissions of oxides of nitrogen, essentially preclude the use of fossil fuel for power production in large new sources. However, irrespective of the potentially adverse impact of this plan on the Nation's welfare, the plan contains a major conceptual problem: that is, if implemented, the plan would force the use of air pollution considerations as the single overriding factor in land use decisions, with no provisions allowed for other environmental, social, or economic considerations.

2. *The NRDC Plan.*—The Natural Resources Defense Council (NRDC) proposed a per capita emission plan. Under this plan the total emissions in clean areas, plus a five percent increase, would be divided by the total population in clean areas to arrive at the allowed per capita emissions. The total emissions allowed in any area would then be calculated as (the population in the area) times (the per capital emission rate). The primary advantages claimed for this proposal are the emphasis on emissions rather than air quality, and the relationship between the level of emissions and the population served. The latter advantage cited by NRDC would in many cases represent a major disadvantage. Because part of the motivation to prevent significant deterioration is concern for currently unquantified but suspected low level effects, it does not seem reasonable to force new polluting development to locate in areas of high population.

This plan would tend to prevent development of currently needed natural resources such as low sulfur coal and

oil shale which are located in areas of very low population. In addition, the location of many other facilities such as smelters, paper mills, phosphate rock processing, and oil shale retorting are determined by the location of natural resources, not by the population served. Under the per capita emission plan it is unlikely that facilities such as these could be built.

The Administrator has given careful consideration to all of the advice, comments, and suggestions which have been offered in support of this rulemaking activity and recognizes and appreciates the time and effort which has been expended by a large number of organizations and individuals. This extensive public participation has been of inestimable value in the development of the regulations which are proposed herein.

There are several questions on which EPA is particularly interested in receiving public comments and relevant data. These include the adequacy of State and local resources to implement the regulations, the interface of these proposed requirements on State and local governments with other Federal and State programs such as the Rural Development Act, and the appropriateness of the air quality increments associated with Class II areas.

Written comments in triplicate may be submitted to the Office of Air Quality Planning and Standards, Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attn. Mr. Padgett. All relevant comments received not later than September 26, 1974 will be considered, and receipt of comments will be acknowledged. Comments received will be available for public inspection during normal business hours at the Office of Public Affairs, 401 M St., S.W., Washington, D.C. 20460.

These regulations are being proposed pursuant to an order of the U.S. District Court for the District of Columbia Circuit in the case of *Sierra Club et al, vs. Administrator of*

EPA, issued May 30, 1973, case number 72-1528 (344 F. Supp. 253). This notice of proposed rulemaking is issued under the authority of section 301(a) of the Clean Air Act as amended [42 U.S.C. 1857g(a)].

Dated: August 15, 1974.

JOHN QUARLES,
Acting Administrator.

Subpart A, Part 52, Chapter I, Title 40, Code of Federal Regulations, is proposed to be amended as follows:

Section 52.21 is revised by designating the first paragraph (a) and adding paragraphs (b), (c), (d), (e), and (f) to read as follows:

52.21 *Significant deterioration of air quality.*

(a) *Plan Disapproval.* Subsequent to May 31, 1972, the Administrator reviewed State implementation plans to determine whether or not the plans permit or prevent significant deterioration of air quality in any portion of any State where the existing air quality is better than one or more of the secondary standards. The review indicates that State plans generally do not contain regulations or procedures specifically addressed to this problem. Accordingly, all State plans are disapproved to the extent that such plans lack procedures or regulations for preventing significant deterioration of air quality in portions of States where air quality is now better than the secondary standards. The disapproval applies to all States listed in Subparts B through DDD of this part. Nothing in this section shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

(b) *Definitions.* For purposes of this section:

(1) The phrase "baseline air quality concentration" refers to both sulfur dioxide and particulate matter and

means the sum of ambient concentration levels existing during 1973, those future concentrations estimated to result from sources granted approval for construction or expansion but not yet operating prior to the effective date of this paragraph, and all other concentration increases estimated to result from new sources operating between January 1, 1974, and the effective date of this paragraph. These concentrations can be measured or estimated where appropriate for the area of impact and for all time periods covered by the defined increments. In the case of the maximum three-hour and twenty-four hour concentrations, only the second highest concentrations should be considered.

(2) The phrases "expansion" or "expanded source" refer to any source which intends to increase production through a major capital expenditure.

(3) The phrase "Administrator" means the Administrator of the Environmental Protection Agency or his designated representative.

(4) The phrase "Federal Land Manager" means the head, or his designated representative, of any Department or Agency of the Federal government which administers federally-owned land, including public domain lands.

(5) The phrase "lands of exclusive federal legislative jurisdiction" means lands over which the federal government has received, by whatever method, all governmental authority of the State, with no reservation made to the State except the right to serve process resulting from activities which occurred off the land involved.

(6) The phrase "Indian Reservation" means any federally-recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

(7) The phrase "Indian Governing Body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized

by the United States as possessing power of self-government.

(8) "Construction" means fabrication, erection, or installation of an affected facility.

(9) "Commenced" means that an owner or operator has undertaken a continuous program of construction or expansion or that an owner or operator has entered into a binding agreement or contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or expansion.

(c) *Area designation and deterioration increment.* (1) This paragraph applies to all States listed in Subpart B through DDD of this part and to all lands of exclusive federal legislative jurisdiction and Indian Reservations.

(2) (i) For purposes of this paragraph, areas designated as Class I or Class II shall be limited to the following increases in pollutant concentrations over baseline air quality concentration:

<i>Area designations</i>		
Pollutant	Class I ($\mu\text{g}/\text{m}^3$)	Class II ($\mu\text{g}/\text{m}^3$)
Particulate matter:		
Annual geometric mean	5	10
24-hour maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hour maximum	5	100
3-hour maximum	25	700

(ii) For purposes of this paragraph, areas designated as Class III shall be limited to concentrations of particulate matter and sulfur dioxide no greater than the national ambient air quality standards.

(3)(i) All areas are designated Class II as of the effective date of this paragraph. Any redesignation shall be determined by the respective States, Federal Land Managers, or Indian governing bodies, as provided below, subject to approval by the Administrator.

(ii) The State may submit to the Administrator a proposal to redesignate areas of the State Class I, Class II, or Class III, provided that:

(a) At least one public hearing is held in or near the area affected and this public hearing is held in accordance with procedures established in § 51.4 of this chapter, and

(b) A summary of the information submitted at the public hearing(s) for the redesignation is provided to the Administrator.

(iii) For lands owned by the Federal Government other than lands of exclusive federal legislative jurisdiction, the State shall propose a redesignation to the Federal Land Manager. This redesignation shall be submitted for approval by the Administrator, provided that:

(a) The requirements of subdivision (ii) of this subparagraph are complied with,

(b) The Federal Land Manager is in agreement with the redesignation, and

(c) All redesignation of Federal land is carried out in a manner consistent with adjacent State and privately owned land.

(iv) A Federal Land Manager may request that the State redesignate Federal lands, or areas affecting Federal lands, and the State shall proceed in accordance with subdivision (iii) of this subparagraph unless the State determines such redesignation would not be in the best public interest.

(v) In the event that disputes between the State and Federal Land Manager over implementation of subdivisions (iii) and (iv) of this subparagraph cannot be resolved, the Executive Office of the President will designate a classification for the area.

(vi) For lands of exclusive federal legislative jurisdiction, the Federal Land Manager shall be responsible for redesignation of such lands, and he may submit to the Administrator a proposal to redesignate areas of such lands Class I, Class II, or Class III, provided that:

(a) At least one public hearing is held in or near the area affected and this hearing is held in accordance with procedures established in § 51.4 of this part, and

(b) A summary of the information submitted at the public hearing(s) for the redesignation is provided to the Administrator, and

(c) Such redesignation is proposed after consultation with the affected State(s).

(vii) Nothing in this section is intended to convey authority to the States over Indian Reservations where such authority is not granted under other laws. For Indian Reservations, the appropriate Indian governing body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III, provided that:

(a) At least one public hearing is held in or near the area affected and this hearing is held in accordance with procedures established in § 51.4 of this chapter, and

(b) A summary of the information submitted at the public hearing(s) for the redesignation is provided to the Administrator, and

(c) Such redesignation is proposed after consultation with the affected State(s) and, for those lands held in trust, with the approval of the Secretary of the Interior.

(viii) The Administrator shall approve, within 60 days, any redesignation proposed pursuant to this subparagraph as follows:

(a) Any redesignation proposed pursuant to subdivisions (ii), (iii), or (iv) of this subparagraph shall be approved unless the Administrator determines (1) that the requirements of subdivisions (ii) through (iv) of this subparagraph have not been complied with, (2) that the State has arbitrarily and capriciously disregarded relevant environmental, social or economic consideration in any redesignation, or (3) that the State has not requested delegation of responsibilities for carrying out this section.

(b) Any redesignation proposed pursuant to subdivision (vi) of this subparagraph shall be approved unless he determines (1) that the requirements of subdivision (vi) of this subparagraph have not been complied with, or (2) that a Federal Land Manager has arbitrarily and capriciously disregarded relevant environmental, social or economic considerations in any redesignation.

(c) Any redesignation submitted pursuant to subdivision (vii) of this subparagraph shall be approved unless he determines (1) that the requirements of subdivision (vii) of this subparagraph have not been complied with, or (2) that an Indian governing body has arbitrarily and capriciously disregarded relevant environmental, social, or economic considerations in any redesignation.

(ix) If the Administrator disapproves any proposed area designation under this subparagraph, the State, Federal Land Manager or Indian governing body, as appropriate, may resubmit the proposal after correcting the deficiencies noted by the Administrator or reconsidering any area designation determined by the Administrator to be arbitrary and capricious.

(d) *Review of new sources.* (1) This paragraph applies to any new or expanded stationary source of a type identi-

fied below in any area designated as Class I or Class II, which has not commenced construction or expansion prior to six months subsequent to the effective date of this paragraph.

(i) Fossil-Fuel Fired Steam Electric Plants of more than 1000 million B.T.U. per hour heat input.

(ii) Coal Cleaning Plants (thermal dryers).

(iii) Kraft Pulp Mill Recovery Furnaces.

(iv) Portland Cement Plants.

(v) Primary Zinc Smelters.

(vi) Iron and Steel Mill Metallurgical Furnaces.

(vii) Primary Aluminum Ore Reduction Plants.

(viii) Primary Copper Smelters.

(ix) Municipal Incinerators capable of charging more than 250 tons of refuse per day.

(x) Sulfuric Acid Plants.

(xi) Petroleum Refineries.

(xii) Lime Plants.

(xiii) Phosphate Rock Processing Plants.

(xiv) By-Product Coke Oven Batteries.

(xv) Sulfur Recovery Plants.

(xvi) Carbon Black Plants (furnace process).

(xvii) Primary Lead Smelters.

(xviii) Fuel Conversion Plants.

(xix) Sintering Plants.

(2) No owner or operator shall commence construction or expansion of a source subject to this paragraph unless the Administrator determines that, on the basis of infor-

mation submitted pursuant to subparagraph (3) of this paragraph:

(i) The effect on air quality concentrations of the source or expanded portion of the source considered with the effect on air quality concentrations of all other new and expanded sources subject to this paragraph and the estimated changes in air quality caused by general commercial, residential, industrial and other growth in the area affected by the proposed source since the date of promulgation of these regulations will not cause the air quality concentration in any area to be increased above the limits shown in paragraph (c)(2) of this section.

(ii) For sources for which standards of performance for new sources have not been proposed under part 60 of this chapter, the source or expanded portion of the source will apply and operate the best available control technology for minimizing emission of particulate matter and sulfur dioxide. In determining best available control technology for each new or expanded source subject to this section, the Administrator shall consider the following:

(a) The process, fuels, and raw material available and intended to be employed,

(b) The engineering aspects of the application of various types of control techniques,

(c) Process and fuel changes,

(d) The cost of the application of the control techniques, process changes, alternative fuels, etc.,

(e) Any applicable State and local emission limitations, and

(f) Locational and siting considerations.

(3) In making the determinations required by subparagraph (2) of this paragraph, the Administrator shall, as a minimum, require the owner or operator of the source

subject to this paragraph to submit: site information, plans, descriptions, specifications, and drawings showing the design of the source, calculations showing the nature and amount of emissions, any other information necessary to determine compliance with any applicable standards of performance for new sources specified in Part 60 of this chapter or any other applicable emission regulations, and the impact that the construction or expansion will have on sulfur dioxide and particulate matter air quality levels. In addition, the owner or operator of the source shall provide information on the nature and extent of general commercial, residential, industrial and other growth which has occurred in the area affected by the source's emissions since the effective date of this paragraph and the estimated impact of such development on ambient concentrations of particulate matter and sulfur dioxide.

(4)(i) Where a new or expanded source is located on Federal lands, such source shall be subject to the procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be in addition to applicable procedures conducted by the Federal Land Manager for administration and protection of the affected Federal lands. Where feasible, the Administrator will coordinate his review and hearings with the Federal Land Manager to avoid duplicate administrative procedures.

(ii) New or expanded sources which are located on Indian Reservations shall be subject to procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be administered by the Administrator in cooperation with the Secretary of the Interior.

(iii) Whenever any new or expanded source is subject to action by a Federal agency which might necessitate preparation of an environmental impact statement pursuant to the National Environmental Policy Act (42 U.S.C. 4321), review by the Administrator conducted pursuant to this paragraph shall be coordinated with the broad en-

vironmental reviews under that Act, to the maximum extent feasible and reasonable.

(e) *Procedures for Public Participation.* (1)(i) Prior to making the determinations required by paragraph (d) of this section, the Administrator, within 30 days after submittal of an application by the owner or operator, shall provide opportunity for public comment on the information submitted by the owner or operator, on the owner or operator's analysis of the effect of such construction or expansion on ambient air quality and the Administrator's proposed approval or disapproval of the owner or operator's application. Opportunity for public comment shall include, as a minimum:

(a) Availability for public inspection, in at least one location in the area affected by the source's emissions of the information submitted by the owner or operator, and the Administrator's analysis of effect on air quality.

(b) A 30 day period for submittal of public comment, and

(c) A notice by prominent advertisement in the area affected by the source's emissions of the location of the information and analysis specified in paragraph (d) of this section.

[31009-31047] (ii) A copy of the notice required under this subparagraph (e)(i) shall be sent to officials and agencies having cognizance over the location where the source will be situated, as follows: State and local air pollution control agencies, the chief executives of the city and county; any comprehensive regional land use planning agency, and any State, Federal Land Manager, or Indian governing body whose lands will be significantly affected by the source's emissions.

(iii) Public comments submitted in writing within 30 days after the date such information is made available

shall be considered by the Administrator in making his final decision on the application. All comments shall be made available for public inspection in at least one location in the area in which the source would be located.

(iv) The Administrator shall take final action on an application within 30 days after the close of the public comment period. The administrator shall notify the applicant in writing of his approval, conditional approval, or denial of the application, and shall set forth his reasons for approval or denial. Such notification shall be made available for public inspection in at least one location in the area in which the source would be located and shall include the conditions under which the source shall operate. These conditions shall include but shall not be limited to specifications of the allowed emission rate and/or the design and operating characteristics of the control equipment required on the source and any reporting requirements as determined by the Administrator.

(v) The Administrator may extend each of the time periods specified in subdivisions (i), (iii), or (iv) of this subparagraph (e)(1) by no more than 30 days, or such other period as agreed to by the applicant and the Administrator.

(2) Any owner or operator who constructs or operates a stationary source not in accordance with the application, as approved and conditioned by the Administrator, or any owner or operator of a stationary source subject to this paragraph who commences construction or expansion six months after promulgation of this regulation without applying for and receiving approval hereunder, shall be subject to enforcement action under section 113 of the Act.

(3) Approval to construct or expand shall become invalid if construction or expansion is not commenced within 18 months after receipt of such approval or if construction is discontinued for a period of 18 months or more. The

Administrator may extend such time period upon a satisfactory showing that an extension is justified.

(4) Approval to construct or expand shall not relieve any owner or operator of the responsibility to comply with the control strategy and all local, State and Federal regulations which are part of the applicable State implementation plan.

(f) *Delegation of Authority.* (1) The Administrator shall have the authority to delegate responsibility for implementing the procedures for conducting source review pursuant to paragraphs (d) and (e) of this section, in accordance with subparagraphs (2), (3), and (4) of this paragraph (f).

(2) Where the Administrator delegates the responsibility for implementing the procedures for conducting source review pursuant to this section to any agency, other than a regional office of the Environmental Protection Agency, the following provisions shall apply:

(i) Where the agency designated is not an air pollution control agency, such agency shall consult with the appropriate State or local air pollution control agency prior to making any determination required by paragraph (d) of this section. Similarly, where the agency designated does not have continuing responsibilities for land use planning, such agency shall consult with the appropriate State or local land use planning agency prior to making any determination required by paragraph (d) of this section.

(ii) A copy of the notice pursuant to paragraph (e) (1)(i)(c) of this section shall be sent to the Administrator through the appropriate regional office.

(3) The Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be delegated, other than to a regional

office of the Environmental Protection Agency, for new or expanded sources which are owned or operated by the Federal government or for new or expanded sources located on Federal lands; except that, with respect to the latter category, where new or expanded sources are constructed or operated on Federal lands pursuant to leasing or other Federal agreements, the Federal Land Manager may at his discretion, to the extent permissible under applicable statutes and regulations, require the lessee or permittee to be subject to a designated State or local agency's procedures developed pursuant to paragraphs (d) and (e) of this section.

(4) The Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be redelegated, other than to a regional office of the Environmental Protection Agency, for new or expanded sources which are located on Indian reservations.

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[42510] *

[Federal Register, Vol. 39, No. 235—Thursday,
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Title 40—Protection of Environment

CHAPTER 1—ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER C—AIR PROGRAMS

[FRL 302-4]

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION
PLANS

Prevention of Significant Air Quality Deterioration

On May 31, 1972 (37 FR 10842), the Administrator of the Environmental Protection Agency published initial approvals and disapprovals of State Implementation Plans submitted pursuant to section 110 of the Clean Air Act, as amended in 1970.

On November 9, 1972 (37 FR 23836), all State Implementation Plans were disapproved insofar as they failed to provide for the prevention of significant deterioration of existing air quality. This action was taken in response to a preliminary injunction issued by the District Court for the District of Columbia, which also required the administrator to promulgate regulations as to any state plan which either permits the significant deterioration of air quality in any portion of any state, or fails to take the measures necessary to prevent such significant deterioration.

Accordingly, on July 16, 1973 (38 FR 18986), an initial notice of proposed rulemaking was published which set

* Bracketed numbers represent the page in the *Federal Register* upon which material following such a number can be found.

forth four alternative plans for preventing significant deterioration, and which solicited widespread public involvement in all aspects of the significant deterioration issue. A series of public hearings were held and over 300 written comments were submitted in response to this proposal. The hearing records and the written comments are available for inspection at the EPA Freedom of Information Office, 401 M Street, SW., Washington, D.C.

Due to the lack of precise direction either in the Clean Air Act or in the Court order, the initial proposals focused on the conceptual basis for regulations. The comments received on the proposed regulations therefore tended primarily to discuss conceptual issues such as the roles of federal and state/local governments, rather than detailed comments regarding implementation of the regulations. Accordingly, on August 27, 1974 (39 FR 31000), the Administrator issued repropoed regulations in order to properly explore all aspects of this issue and to focus more clearly on procedural and technical issues.

The Administration has submitted for consideration an amendment to the Act which would eliminate the requirement for preventing significant deterioration of air quality. This amendment is pending before the Congress. Although EPA does not endorse this amendment, EPA seeks full public debate on the significant deterioration issue and in issuing these regulations does not intend to delay or influence consideration of this amendment. The regulations issued herein are necessary because the Court has ruled that the current Clean Air Act requires the Administrator to prevent significant deterioration, and this requirement must be met even though it is possible that Congress may provide additional guidance and/or legislative changes in the future.

The regulations proposed on August 27, 1974, called for the establishment of "classes" of different allowable incremental increases in total suspended particulates (TSP)

and sulfur dioxide (SO₂). Class I applied to areas in which practically any change in air quality would be considered significant; Class II applied to areas in which deterioration normally accompanying moderate well-controlled growth would be considered insignificant; and Class III applied to those areas in which deterioration up to the national standards would be considered insignificant. Under the proposed regulation, all areas of the country would be designated Class II initially, with provisions for allowing States to reclassify any area to accommodate the social, economic, and environmental needs and desires of the public.

The plan would be implemented through a preconstruction review of specified source categories to determine whether these sources would cause a violation of the appropriate increments. The new source review also included a provision requiring the use of best available control technology on sources covered by the regulation. Finally, the proposal provided procedures for public comment on each application for permission to construct and for delegating the responsibility for implementing the new source review procedures to States or local governmental units.

DISCUSSION OF PUBLIC COMMENTS

The August 27 proposal was criticized by environmental groups as being unresponsive to the District Court's order in that it permits the deterioration of air quality up to the national standards in Class III regions. Although this result could also occur in Class I or Class II regions where the difference between existing air quality and the national standard is less than the prescribed air quality increment, all such comments focused on the provision for Class III areas. Unless "significant deterioration" is defined as a percentage of the "unused" air resource, any air quality increment plan, regardless of how small the increment is, could allow deterioration up to the national standard in

some instances. As discussed in the preamble to the proposals of July 16, 1973, and August 27, 1974, air quality monitoring is presently concentrated in heavily polluted areas, with only scattered monitoring in relatively clean areas. Vast numbers of additional monitors will be necessary to precisely define existing air quality, making a plan that is dependent on a knowledge of existing air quality virtually unworkable. Therefore, the fact that air quality could, in some instances, increase to the national standard, does not, in the Administrator's opinion, make the August 27 proposal inconsistent with the Court's ruling.

Additional comments involving Class III areas indicated that economic and social factors should have no bearing on the definition of significant deterioration. These comments stated that EPA must consider only air quality factors and that a single nationwide definition of significant deterioration must be established. Such comments did not take issue with Agency statements made on July 16, 1973, and August 27, 1974, that the definition of significant deterioration is basically a subjective decision. None of the comments suggesting changes to the increments proposed by the Administrator, or proposing alternate plans, offered any justification for the numbers which were selected. Since the consideration of "air quality factors" alone essentially leads to an arbitrary definition of what is "significant," this term only has meaning when the economic and social implications are analyzed and considered. Therefore, the Administrator believes that it is most important to recognize and consider these implications, since the consideration of air quality factors alone provides no basis for selecting one deterioration increment over another.

Even in the subjective terms that are required when considering only the environmental aspects, the contention that there must be a single definition of significant deterioration applicable nationwide does not appear to address

the wide range of environmental needs which exist. Most of the comments implicitly recognized that there is a need to develop resources in presently clean areas of the country, and that significant deterioration regulations should not preclude all growth, but should ensure that growth occurs in an environmentally acceptable manner. However, there are some areas, such as national parks, where any deterioration would probably be viewed as significant. A single nationwide deterioration increment would not be able to accommodate these two situations.

Along these lines, comments were specifically requested in the proposal as to whether the Class II increment should be doubled. Power companies generally supported such a change, while other comments from the industrial sector indicated that the increments were adequate for well-controlled growth. Power companies indicated that many new plants would be much larger than those which would be allowed in a Class II area (approximately 1000 megawatts), and that the Class II increment ought to accommodate such development. None of the comments presented any reasons for permitting such development in a Class II rather than a Class III area, except that the initial designation of all areas will be Class II. The Administrator continues to feel that a Class II increment should be compatible with moderate, well-controlled development in a nationwide context, and that large-scale development should be permitted only in conjunction with a conscious decision to redesignate the area as Class III.

[42511] Many comments also criticized the omission of carbon monoxide (CO), nitrogen oxides (NO_x), by hydrocarbons (HC), and photochemical oxidants (O_x) from the regulations. As indicated on July 16, 1973, and August 27, 1974, and in previous actions involving indirect source review (38 FR 29893 at 29894, 39 FR 7270 at 7272, and 39 FR 25292 at 25295), existing analytical procedures are not adequate to determine the impact of individual sources on

air quality concentrations of reactive pollutants (NO_x and HC/O_x). The only presently available technique for relating emissions to air quality for these pollutants is the areawide proportional model used for demonstrating the adequacy of control strategies. The proportional model requires that measured air quality data be available; however, as indicated above, such data are very limited in presently clean areas (even more so than for TSP and SO₂). In contrast, the air quality concentration of stable pollutants can reasonably be estimated using a diffusion model and therefore measured air quality data are not necessary to determine the incremental air quality impact of an individual source. In addition, since the proportional model assumes that air quality is proportional to emissions, the key to analyzing the impact of an individual source focuses on the definition of baseline emissions. If the source would be located in a very clean area with virtually no baseline emissions, then the predicted air quality increase would be very large (when in fact it probably would not). If the source would be located in a large metropolitan area and the baseline emissions are those of the entire metropolitan area, then the predicted impact of a single additional source would be very small. Therefore, the proportional model is adequate for control strategy development in urban areas where measured air quality data are available and the aggregate impact of controlling many sources is being analyzed. However, it is inappropriate for analyzing the incremental impact of individual new sources.

At this time, the only practical approach for dealing with these pollutants appears to be to minimize emissions as much as possible. The Federal Motor Vehicle Control Program accomplishes this for individual motor vehicles. New source performance standards (NSPS) have already been established under Part 60 of this chapter for many of the source categories subject to the regulation. Where practicable, emission limitations for CO, NO_x, and HC

have been promulgated for those sources presently subject to Part 60. Although some of the source categories are not yet included in Part 60, either (1) those that are not covered are not significant emitters of CO, NO_x, or HC, or (2) control technology for these pollutants is unavailable or an emission limitation is impractical (e.g. HC emissions from coke ovens).

One additional step which could be taken to minimize emission of CO, NO_x, and HC appears to be in the area of minimizing vehicle miles of travel (VMT). Plans for reducing VMT and minimizing future VMT growth have been developed as part of the Transportation Control Plans (TCP) promulgated elsewhere in this chapter. Since the TCP's focus on major metropolitan areas, the flexibility available in designing these plans would be more limited when applied to rural and outlying areas. It is clear, however, that comprehensive transportation planning offers an appropriate mechanism for minimizing VMT growth in such areas. It is not clear, however, how EPA might become involved in comprehensive transportation planning throughout the country under these regulations, although States may wish to consider such an approach when developing their own plans to prevent significant deterioration. States of course, are not precluded from including other more comprehensive measures for dealing with HC, CO, and NO_x in their own plans.

Some difficult additional questions arise as to how this concept of VMT minimization could be incorporated into these significant deterioration regulations. Would the addition of a VMT increment, similar to the air quality increment approach used in these regulations, be appropriate? Would a new source review of specific indirect source be practical, or should the review apply to larger scale projects such as a new town or a large new development? The Administrator solicits additional comments on

this issue and may modify the regulation at a later date if workable procedures in this area can be developed.

The August 27 proposal specified that all areas of the country, including those areas above the national standards, would be subject to the significant deterioration regulations, even though the District Court order only required the prevention of significant deterioration in areas presently below the national standards. This was done because it was not possible to specify in these regulations all areas of the country which exceed the national ambient air quality standards. In addition, there would be no practical impact of these significant deterioration regulations in areas above the standards, since emissions in such areas are being reduced under the state implementation plans, while these regulations provide for limited allowable increases in emissions.

Nonetheless, there were a number of comments requesting that these regulations specifically exempt all areas presently above the national standards. The regulations promulgated below provide for this exemption only with respect to the area classification requirements. The pre-construction review is still applicable in all areas of the country, in order to ensure that new sources be examined for their impact in presently clean areas which may be adjacent to areas that are above the national standards. In addition, the requirements for applying best available control technology are also applicable to all sources subject to review in order to minimize the deterioration caused by individual sources. This requirement is particularly important where a source in one State would use up a significant portion of the air quality increment in a neighboring State.

The exemption of areas from the classification requirements will be done on a county basis (or functionally equivalent area) and will be based on a determination by the State that the air quality in the county is pervasively

above the national standard. No attempt has been made to define these counties in these regulations. Instead, States must notify the Administrator by June 1, 1975, of those areas which are exempt from the classification requirements.

There were a number of comments requesting clarification of the relationship of these regulations to other portions of the existing implementation plans, particularly the air quality maintenance plans (AQMP's) to be submitted by June, 1975. An air quality maintenance area (AQMA) is an area designated by the Administrator that may have the potential for exceeding any national standard within the next 10-year period as a consequence of current air quality and/or the projected growth rate of the area. The States are required to submit an analysis of the impact on air quality of projected growth in each designated potential problem area. Where maintenance problems are identified by this analysis, the states must also submit plans containing measures to ensure maintenance of national standards during the ensuing 10-year period. AQMA's have been proposed for specific pollutants and final designations will be published shortly. Where an AQMA has been designated because of projected problems in maintaining the NAAQS for either TSP or SO₂, the significant deterioration increment is applicable only to those portions of the AQMA which are cleaner than either standard. By design AQMA boundaries have been designated to include substantial areas which are relatively clean. This has been done to insure that the planning area corresponds to the entire area where projected new growth in emissions is likely to occur and where regional planning for public services, housing and employment is focused.

Although there seemed to be a general assumption that AQMA's should be designated as Class III, there are several situations where a State may wish to leave the clean air portions of an AQMA as Class II or even to redesignate

the area to a Class I. This would limit peripheral growth so as to complement the goals of the AQMP and in this context, the significant deterioration would actually be a mechanism for partially implementing the AQMP. In addition, there are several clean air areas which have been proposed as AQMA's due to anticipated large-scale development of natural resources. A Class I or Class II designation for such areas would probably eliminate the need for an AQMP for TSP or SO₂, since the air quality constraint would be the Class I or Class II increment. Therefore, a "designation" of the AQMA for TSP or [42512] SO₂ may be appropriate. In any case, the Administrator recommends that any proposed significant deterioration redesignation have boundaries consistent with AQMA boundaries to facilitate the development of the AQMA plan.

A Class III designation does not necessarily mean that an AQMP would be required. For example, a clean air area might be designated Class III on the basis of a marginal anticipated deterioration in air quality which exceeds the Class II increments. However, the anticipated resulting air quality would still be well below the national standards. If little additional development were anticipated over the subsequent 10-year period so as to threaten the national standards, no AQMP would be required.

Furthermore, it is important to recognize that area classifications do not necessarily imply current air quality or current land use patterns. Instead, classifications should reflect the desired degree of change from current levels and patterns.

A number of public comments indicated concern that these regulations would create a duplication of new source review procedures, which would require a source owner to apply to several different governmental agencies before he could commence construction.

Where the State assumes responsibility for carrying out the new source review procedure under these regulations, most of the concerns expressed above should be eliminated. Procedurally and administratively, the significant deterioration review is virtually identical to existing new source review procedures included in the implementation plan and, in fact, application could probably be made on the same forms. No additional sources would be covered by the significant deterioration review. The only difference between the two new source reviews is in the tests which must be met before approval will be granted. Instead of meeting only the emission limitations which are part of the applicable plan, sources covered by the significant deterioration review must also meet an emission limitation which is consistent with the application of best available control technology. The most restrictive emission limitation supersedes all others. In addition to not causing a violation of any national standard, sources covered by the significant deterioration review must not cause an applicable air quality increment to be exceeded. Technically, the calculations needed to determine if those additional tests will be met are very similar to those already being done. Therefore, where a State administers these regulations, integration with the existing plan should be relatively easy, resulting in only minor additional resource demands. If States do not assume responsibility for implementing these regulations, EPA, through its Regional Offices, will carry out the new source review as required by the Act. Since this may cause duplication of effort on the part of EPA and the States, as well as additional requirements for source owners, the Administrator strongly urges States to accept delegation of these regulations or to develop their own regulations pursuant to the guidance to be issued shortly pursuant to Part 51 of this chapter.

In response to public comments, the Administrator is considering the addition of other source categories, such

as asphalt concrete plants and ferro-alloy plants, to these regulations. One possibility is to add those sources for which new source performance standards for particulate matter, and sulfur dioxide have been proposed or promulgated under Part 60 of this chapter. A proposal to add other source categories will be issued shortly.

One comment indicated confusion as to what functions the Administrator intended to delegate to States under these regulations. The confusion apparently related to the definition of "Administrator" under paragraph (b)(3) as including the Administrator's "designated representative." Although the term "Administrator" is used in paragraph (c), relating to the approval of State redesignation, the Administrator does not intend to designate to a representative outside the Agency the review and approval functions under this paragraph. As indicated in paragraph (f), the only functions which will be delegated to States will be the preconstruction review under paragraphs (d) and (e).

A question was raised as to whether an area could have one classification for SO₂ and another for TSP. Different classifications for SO₂ and TSP may make sense in certain situations, and the Administrator does not intend to preclude this option.

Several public comments requested that the technical procedures for determining the air quality impact of a new source be specified by EPA. The techniques the Agency intends to use in most cases are set forth in "Guidelines for Air Quality Maintenance Planning and Analysis," Vols. 10 and 12. Volume 10, "Reviewing New Stationary Sources," pertains to the air quality impact of individual sources, while Vol. 12, "Applying Atmospheric Simulation Models to Air Quality Maintenance Areas," will be used to determine the impact of other growth and development in the area affected by the source. These documents are

available for inspection at EPA's Regional Offices and the EPA Freedom of Information Center, 401 M Street, SW., Washington, D.C. 20460, and will be available shortly for general distribution through the National Technical Information Service, 5258 Port Royal Road, Springfield, Virginia 22151. The Administrator, or States which will be implementing the preconstruction review as EPA's agent, is not required to use the techniques in these documents if other techniques are more appropriate in certain circumstances.

There was considerable divergence of opinion over the initial classification of all areas. Industrial groups generally supported an initial designation of Class III so as to minimize disruption of projects scheduled to commence construction in the near future. Environmental groups supported an initial designation of Class I, fearing that a Class II or III designation would permit air quality deterioration of some clean areas before States could act to redesignate areas to a more restrictive classification. The Administrator continues to feel that an initial Class II designation represents the most reasonable compromise between these widely differing positions. Also, since the regulations apply only to sources which commence construction after June 1, 1975, the Administrator feels that this deferral should reduce disruption to the industrial sector while permitting States sufficient time to consider reclassifying any area either to Class I or III before requests for approval must be acted upon.

There were several questions raised concerning the appropriate size of an area which should be considered for redesignation. Calculations have shown that because of the small air quality increments specified for Class I areas, these levels can be violated by a source located many miles inside an adjacent Class II or III area. For example, a power plant which just meets the Class II increment for SO_2 could under some conditions violate the

Class I increment for SO_2 60 or more miles away. Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State. Therefore, wherever a Class I area adjoins a Class II or III area, the potential growth restrictions, especially for power plant development, extends well beyond the Class I boundaries into the adjacent areas. A similar situation exists, to a greater or lesser degree, wherever areas of different classification adjoin each other. Therefore, the area with the less restrictive classification should include an additional area at the periphery where it is clearly recognized that development will be somewhat restricted due to the adjacent "cleaner" area. As a result, a Class I redesignation could be fairly limited in size, yet the adjoining Class II or Class III areas would need to cover a substantial area in order to fully utilize the Class II or III increment. Again, it should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment.

The distance a large source would need to be located away from a Class I boundary is more dependent on the meteorological conditions in the area rather than the size of the source. Where very long pollutant travel times from the source to the receptor are involved, the assumptions concerning the persistence of wind direction and atmospheric stability are critical. At some point, it can be assumed that a receptor will be virtually [42513] unaffected by a source, regardless of the source's strength, since the critical meteorological conditions would not be expected to persist long enough to move the pollutants from source to receptor for any significant period of time. This distance is, of course, dependent on local meteorological conditions.

logical conditions, but for most areas the maximum distance would be 60 to 100 miles.

CHANGES TO THE REGULATIONS

1. *Definition of Modified Source.* The term "expanded source" was used in the proposal in place of the more commonly used term "modified source" in order to specifically exclude from the preconstruction review sources which increase emissions solely due to switching from a low sulfur to a higher sulfur content fuel. The proposed definition of expanded source was related to whether a source increased emissions through a "major capital expenditure." This phrase was criticized by many as being too vague. Therefore, the general term "modified source" has been reinstated, along with a specific exemption for fuel conversion, which exemption is applicable only to the significant deterioration review procedures. The general definition of modified source in Part 52 is changed slightly to be more specific and to be consistent with the definition used in Part 60. Changes to the definition of modification in Part 60 were proposed on October 15, 1974 (39 FR 36946) and comments on this proposal are presently being analyzed. It is the Administrator's intent to change the definition of modification under Part 52 to be consistent with the final definition of this term under Part 60.

These changes are not intended to modify the applicability of either the proposed significant deterioration regulations or other new source review procedures promulgated elsewhere in Part 52.

2. *Definition of best available control technology.* Since this term may be used elsewhere in Part 52 in the future, it has been defined in the general definitions section of Part 52. The definition is consistent with the wording used in the August 27 proposal. It should be noted that new source performance standards (NSPS) may only apply to certain affected facilities within a large source. For

example, only basic oxygen process furnaces in a steel mill are presently covered by NSPS, while blast furnaces, scarfing operations and other significant sources within the mill are not presently covered. BACT must be determined for these facilities on a case-by-case basis until such time as NSPS are issued for these other facilities.

3. *Definition of baseline air quality concentration.* The proposal intended to establish the baseline air quality as that air quality existing as of the effective date of regulation, adjusted to include air resource commitments resulting from approval of other air pollution sources pursuant to existing new source review procedures in the plan. The definition of baseline air quality has been clarified to reflect this intent and the calculation has been simplified by specifying the use of 1974 air quality data rather than 1973 data. No substantive change is intended by this revision.

4. *Conditions for applying for redesignation of areas.* In order that the Administrator have an adequate basis for determining whether an application to redesignate an area should be approved or disapproved, a provision has been added to paragraph (c)(3)(ii) to require that the necessary information be a part of the hearing record on the proposed designation. Specifically, the hearing record must show that the social, environmental, and economic effects of the proposed redesignation have been evaluated for the area being reclassified as well as for adjacent areas and that regional and national interests have been considered. The Administrator will provide additional guidance to assist States in developing their redesignation proposals and analyzing the impact of such redesignations.

5. *State reclassification of Federal and Indian Lands.* Various public comments indicate that Federal lands should be subject to State jurisdiction. EPA did not intend to preclude State redesignations provided that the

Federal Land Manager can elect to keep the air quality over Federal lands in a more pristine condition than the State might designate. Therefore, the regulations have been revised to subject Federal lands to State redesignations but reserve to the Federal Land Manager the authority to subject such lands to a more stringent designation. This approach is consistent with section 118 of the Clean Air Act (42 U.S.C. 1857f) which requires that Federal agencies having jurisdiction over any property or facility meet substantive State air pollution control standards and limitations. There is nothing in the Clean Air Act or the legislative history of the Act that indicates the Congress intended to preclude the Federal Government from meeting more restrictive standards than are imposed by the States. This provision also ensures that national forests and parks can be protected by the Federal Government from deterioration of air quality. The different treatment accorded lands of exclusive Federal jurisdiction has been eliminated since the revised regulations make it clear that the Federal Government can protect air quality over all Federal lands. In accordance with Executive Order 11752, these regulations do not require Federal facilities to comply with State or local administrative procedures with respect to pollution abatement and control. Review of new sources on Federal lands is reserved to EPA, except as State review is permitted by a Federal Land Manager with respect to activities conducted under Federal leases.

The State of New Mexico commented that the proposed regulations appeared to take authority away from the States to regulate air pollution over Indian lands. These regulations were not intended to alter the present legal relationships between the States and Indian Reservations within the States. As these relationships vary from State to State, EPA has not attempted to define such relationships but has modified the proposed regulations to clarify that there is no intent to alter these relationships. Where States have not assumed jurisdiction over Indian lands,

the regulations provide that the Indian governing body may propose redesignations to the Administrator. Boundary problems between Indian and State lands are dealt with in the same way that boundary problems between two States are dealt with, as discussed below. This is consistent with the independent status of Indian lands not subject to State laws.

6. *Public comment on proposed redesignations.* In order to permit the public an opportunity to comment on whether a proposed redesignation should be approved or disapproved, the Administrator will publish all proposed redesignations in the *FEDERAL REGISTER* as proposed rule-making and provide at least 30 days for submission of public comments.

7. *Preconstruction review and BACT in Class III areas.* Several public comments criticized the proposed regulations for exempting sources in Class III areas from preconstruction review. It was pointed out that there would be no procedure to prevent construction of a source in a Class III area which would violate an increment in an adjacent Class I or II area. Therefore, the regulations promulgated below require that new sources, wherever they are located, must be reviewed to determine the impact on air quality in adjacent regions.

In order to minimize the deterioration caused by individual sources, the proposal has been modified to make the BACT requirements applicable wherever the source is located, not just in Class I or II areas. Since a source located many miles away from a Class I area could easily use up the entire Class I increment, as discussed below, the necessity to minimize emissions as much as possible in all areas is particularly important.

8. *Determination of allowable air quality increment.* The provisions of paragraph (d)(2)(i) have been modified to be more specific and to specify that reduction of emissions

from existing sources which contributed to the baseline air quality concentration should be accounted for in determining the unused portion of the allowed air quality increment.

9. *EPA review of state redesignations.* The proposed regulations did not adequately cover problems created when a State or Indian Governing Body wishes to designate one or more of its areas in such a way that it will have a negative impact on other States or Indian Reservations. These regulations provide that a State or Indian Governing Body must take into account the effect of proposed redesignations on other States, Indian Reservations, and regional and national [42514] interests. Where no State or Indian Governing Body protests the redesignation of another State or Indian Reservation, the Administrator will only review the redesignation to determine whether it is arbitrary and capricious. However, where a State or Indian Governing Body protests a redesignation to the State proposing the redesignation and to the Administrator, the Administrator will take an expanded role of review in which he will balance the competing interests involved.

10. *Specification of emission limitation.* In order to ensure that the requirement for applying BACT is properly implemented, the provisions of paragraph (d)(2)(ii) have been modified to require that an emission limitation be established as a condition to approval. This places the emphasis on emissions rather than the presence of any particular control equipment. This change also makes the BACT requirement for sources not covered by NSPS more consistent with the NSPS requirements. However, if the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an emission standard infeasible, he may instead prescribe a design or equipment standard requiring the application of best available control technology. Such standard

shall to the degree possible set forth the emission reductions achievable by implementation of such design or equipment, and shall provide for compliance by means which achieve equivalent results.

11. *Responsibility for performing air quality impact analysis.* A number of public comments suggested that the reviewing agency analyze the air quality impact of additional growth that has occurred in the vicinity of the proposed source since the reviewing agency is more likely to have the necessary data which is needed. The Administrator has concluded that it would be more appropriate for the reviewing agency to perform the air quality impact analysis based on information submitted by the applicant. This change will eliminate the uncertainty which was expressed concerning the requirement that the applicant analyze the air quality impact of general growth and development "in the area affected by the proposed source," since the reviewing agency will define this area and perform the calculations required. Also the provisions of paragraph (d)(3) do not require the applicant to submit growth data with each application. However, the reviewing agency may request such data from the applicant in cases where it does not have the necessary information and will specify the area over which such information is required.

12. *Procedures for public participation.* The procedures specified in paragraph (e) for public comment on an application to construct have been modified to be consistent with the procedures contained in EPA's regulations for indirect source review (33 FR 25292). The changes allow the reviewing agency to require additional information, where necessary, and permit the applicant to respond to public comments involving his application to construct.

13. *Sources subject to review.* As proposed on August 27, several of the 19 source categories subject to the preconstruction review appeared to be restricted to an individual process (e.g. Kraft pulp mill recovery furnaces) rather

than all emission points on the premises. The wording has been changed to be consistent with the listing of the other source categories and to make clear that all emission points associated with a stationary source must be considered in determining whether the source will violate an applicable air quality increment. This change allows sintering plants to be dropped from the list, since sintering operations will be covered under the primary metals industries which are subject to review under these regulations.

A detailed explanation of the technical and policy considerations which form the basis for these regulations is being prepared. Upon completion, the Administrator will publish a notice of the FEDERAL REGISTER announcing the availability of this information for public inspection.

These regulations will be effective January 6, 1975 and will be applicable to sources commencing construction on or after June 1, 1975.

(Secs. 110(c) and 301(a) of the Clean Air Act as amended [42 U.S.C. 1857 c-5(c) and 1857 g(a)])

Dated: November 27, 1974.

RUSSELL E. TRAIN,
Administrator.

Subpart A, Part 52, Chapter I, Title 40, Code of Federal Regulations, is amended as follows:

1. In § 52.01, paragraph (d) is revised and paragraph (f) is added. As amended § 52.01 reads as follows:
§ 52.01 *Definitions.*

• • • • •
(d) The phrases "modification" or "modified source" mean any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under Part 50 of this chapter or

which results in the emission of any such pollutant not previously emitted, except that:

(1) Routine maintenance, repair, and replacement shall not be considered a physical change, and

(2) The following shall not be considered a change in the method of operation:

(i) An increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(ii) An increase in the hours of operation;

(iii) Use of an alternative fuel or raw material, if prior to the effective date of a paragraph in this Part which imposes conditions on or limits modifications, the source is designed to accommodate such alternative use.

• • • • •

(f) The term "best available control technology," as applied to any affected facility subject to Part 60 of this chapter, means any emission control device or technique which is capable of limiting emissions to the levels proposed or promulgated pursuant to Part 60 of this chapter. Where no standard of performance has been proposed or promulgated for a source or portion thereof under Part 60, best available control technology shall be determined on a case-by-case basis considering the following:

(1) The process, fuels, and raw material available and to be employed in the facility involved,

(2) The engineering aspects of the application of various types of control techniques which have been adequately demonstrated,

(3) Process and fuel changes,

(4) The respective costs of the application of all such control techniques, process changes, alternative fuels, etc.,

(5) Any applicable State and local emission limitations, and

(6) Locational and siting considerations.

2. Section 52.21 is revised by designating the first paragraph (a) and adding paragraphs (b), (c), (d), (e), and (f) to read as follows:

§ 52.21 *Significant deterioration of air quality.*

(a) *Plan disapproval.* Subsequent to May 31, 1972, the Administrator reviewed State implementation plans to determine whether or not the plans permit or prevent significant deterioration of air quality in any portion of any State where the existing air quality is better than one or more of the secondary standards. The review indicates that State plans generally do not contain regulations or procedures specifically addressed to this problem. Accordingly, all State plans are disapproved to the extent that such plans lack procedures or regulations for preventing significant deterioration of air quality in portions of States where air quality is better than the secondary standards. The disapproval applies to all States listed in Subparts B through DDD of this part. Nothing in this section shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

(b) *Definitions.* For purposes of this section:

(1) The phrase "baseline air quality concentration" refers to both sulfur dioxide and particulate matter and means the sum of ambient concentration levels existing during 1974 and those additional concentrations estimated to result from sources granted approval (pursuant to approved new source review procedures in the plan) for construction or modification but not yet operating prior to [42515] January 1, 1975. These concentrations shall be

established for all time periods covered by the increments set forth under paragraph (c)(2)(i) of this section, and may be measured or estimated. In the case of the maximum three-hour and twenty-four-hour concentrations, only the second highest concentrations should be considered.

(2) The phrase "Administrator" means the Administrator of the Environmental Protection Agency or his designated representative.

(3) The phrase "Federal Land Manager" means the head, or his designated representative, of any Department or Agency of the Federal Government which administers federally-owned land, including public domain lands.

(4) The phrase "Indian Reservation" means any federally-recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

(5) The phrase "Indian Governing Body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

(6) "Construction" means fabrication, erection, or installation of an affected facility.

(7) "Commenced" means that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a binding agreement or contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

(c) *Area designation and deterioration increment.* (1) This paragraph applies to all States listed in Subpart B through DDD of this part, all lands owned by the Federal Government, and Indian Reservations, except those counties or other functionally equivalent areas that pervasively exceed any national ambient air quality standards for

sulfur oxides or total suspended particulates and then only with respect to such pollutants. States shall notify the Administrator by June 1, 1975, of those areas which are above the national air quality standards and therefore are exempt from the requirements of this paragraph.

(2)(i) For purpose of this paragraph, areas designated as Class I or Class II shall be limited to the following increases in pollutant concentrations over the baseline air quality concentration:

<i>Area designations</i>		
Pollutant	Class I (g/m)	Class II (g/m)
Particulate matter:		
Annual geometric mean	5	10
24-hour maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hour maximum	5	100
3-hour maximum	25	700

(ii) For purposes of this paragraph, areas designated as Class III shall be limited to concentrations of particulate matter and sulfur dioxide no greater than the national ambient air quality standards.

(3)(i) All areas are designated Class II as of the effective date of this paragraph. Redesignation may be proposed by the respective States, Federal Land Managers, or Indian Governing Bodies, as provided below, subject to approval by the Administrator.

(ii) The State may submit to the Administrator a proposal to redesignate areas of the State Class I, Class II, or Class III, provided that:

(a) At least one public hearing is held in or near the area affected and this public hearing is held in accordance with procedures established in § 51.4 of this chapter, and

(b) Other States which may be affected by the proposed redesignation are notified at least 30 days prior to the public hearing, and

(c) A discussion of the reasons for the proposed redesignation is available for public inspection at least 30 days prior to the hearing and the notice announcing the hearing contains appropriate notification of the availability of such discussion, and

(d) The proposed redesignation is based on the record of the State's hearing, which must reflect the basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the area being proposed for redesignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interests.

(iii) Except as provided in subdivision (iv) of this subparagraph, a State in which lands owned by the Federal Government are located may submit to the Administrator a proposal to redesignate such lands Class I, Class II, or Class III in accordance with subdivision (ii) of the subparagraph provided that:

(a) The redesignation is consistent with adjacent State and privately owned land, and

(b) Such redesignation is proposed after consultation with the Federal Land Manager.

(iv) Notwithstanding subdivision (iii) of this subparagraph, the Federal Land Manager may submit to the Administrator a proposal to redesignate any Federal lands to a more restrictive designation than would otherwise be applicable provided that:

(a) The Federal Land Manager follows procedures equivalent to those required of States under paragraph (c)(3)(ii) and,

(b) Such redesignation is proposed after consultation with the State(s) in which the Federal Land is located or which border the Federal land.

(v) Nothing in this section is intended to convey authority to the States over Indian Reservations where States have not assumed such authority under other laws nor is it intended to deny jurisdiction which States have assumed under other laws. Where a State has not assumed jurisdiction over an Indian Reservation the appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III, provided that:

(a) The Indian Governing Body follows procedures equivalent to those required of States under paragraph (c)(3)(ii) and,

(b) Such redesignation is proposed after consultation with the State(s) in which the Indian Reservation is located or which border the Indian Reservation and, for those lands held in trust, with the approval of the Secretary of the Interior.

(vi) The Administrator shall approve, within 90 days, any redesignation proposed pursuant to this subparagraph as follows:

(a) Any redesignation proposed pursuant to subdivisions (ii) and (iii) of this subparagraph shall be approved unless the Administrator determines (1) that the requirements of subdivisions (ii) and (iii) of this subparagraph have not been complied with, (2) that the state has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(d) of this paragraph, (3) that the State has not requested delegation of

responsibility for carrying out the new source review requirements of paragraphs (d) and (e) of this section.

(b) Any redesignation proposed pursuant to subdivision (iv) of this subparagraph shall be approved unless he determines (1) that the requirements of subdivision (iv) of this subparagraph have not been complied with, or (2) that the Federal Land Manager has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(d) of this paragraph.

(c) Any redesignation submitted pursuant to subdivision (v) of this subparagraph shall be approved unless he determines (1) that the requirements of subdivision (v) of this subparagraph have not been complied with, or (2) that the Indian Governing Body has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(d) of this paragraph.

(d) Any redesignation proposed pursuant to this paragraph shall be approved only after the Administrator has solicited written comments from affected Federal agencies and Indian Governing Bodies and from the public on the proposal.

(e) Any proposed redesignation protested to the proposing State, Indian Governing Body, or Federal Land Manager and to the Administrator by another State or Indian Governing Body because of the effects upon such protesting State or Indian Reservation shall be approved by the Administrator only if he determines that in his judgment the redesignation appropriately balances considerations of growth anticipated in the area proposed to be redesignated; the social, environmental and economic effects of such redesignation upon the [42516] area being redesignated and upon other areas and States; and any impacts upon regional or national interests.

(vii) If the Administrator disapproves any proposed area designation under this subparagraph, the State, Fed-

eral Land Manager or Indian Governing Body, as appropriate, may resubmit the proposal after correcting the deficiencies noted by the Administrator or reconsidering any area designation determined by the Administrator to be arbitrary and capricious.

(d) *Review of new sources.* (1) This paragraph applies to any new or modified stationary source of a type identified below which will be located in any State listed in Subpart B through DDD of this part, which source has not commenced construction or expansion prior to June 1, 1975. A source which is modified, but does not increase the amount of a pollutant other than sulfur oxides or particulate matter, or is modified to utilize an alternative fuel, or higher sulfur content fuel shall not be subject to this paragraph.

(i) Fossil-Fuel Steam Electric Plants of more than 1000 million B.T.U. per hour heat input.

(ii) Coal Cleaning Plants.

(iii) Kraft Pulp Mills.

(iv) Portland Cement Plants.

(v) Primary Zinc Smelters.

(vi) Iron and Steel Mills.

(vii) Primary Aluminum Ore Reduction Plants.

(viii) Primary Copper Smelters.

(ix) Municipal Incinerators capable of charging more than 250 tons of refuse per 24 hour day.

(x) Sulfuric Acid Plants.

(xi) Petroleum Refineries.

(xii) Lime Plants.

(xiii) Phosphate Rock Processing Plants.

(xiv) By-Product Coke Oven Batteries.

(xv) Sulfur Recovery Plants.

(xvi) Carbon Black Plants (furnace process).

(xvii) Primary Lead Smelters.

(xviii) Fuel Conversion Plants.

(2) No owner or operator shall commence construction or modification of a source subject to this paragraph unless the Administrator determines that, on the basis of information submitted pursuant to subparagraph (3) of this paragraph:

(i) The effect on air quality concentration of the source or modified source, in conjunction with the effects of growth and reduction in emissions after January 1, 1975, of other sources in the area affected by the proposed source, will not violate the air quality increments applicable in the area where the source will be located nor the air quality increments applicable in any other areas. The analysis of emissions growth and reduction after January 1, 1975, or other sources in the areas affected by the proposed source shall include all new and modified sources granted approval to construct pursuant to this paragraph; reduction in emissions from existing sources which contributed to the baseline air quality; and general commercial, residential, industrial, and other sources of emissions growth not included in the definition of baseline air quality which has occurred since January 1, 1975.

(ii) The new or modified source will meet an emission limit, to be specified by the Administrator as a condition to approval, which represents that level of emission reduction which would be achieved by the application of best available control technology, as defined in § 52.01(f), for particulate matter and sulfur dioxide. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a partic-

ular class of sources would make the imposition of an emission standard infeasible, he may instead prescribe a design or equipment standard requiring the application of best available control technology. Such standard shall to the degree possible set forth the emission reductions achievable by implementation of such design or equipment, and shall provide for compliance by means which achieve equivalent results.

(iii) With respect to modified sources, the requirements of subparagraph (2)(ii) of this paragraph shall be applicable only to the facility or facilities from which emissions are increased.

(3) In making the determinations required by subparagraph (2) of this paragraph, the Administrator shall, as a minimum, require the owner or operator of the source subject to this paragraph to submit: site information; plans, description, specifications, and drawings showing the design of the source; information necessary to determine the impact that the construction or modification will have on sulfur dioxide and particulate matter air quality levels; and any other information necessary to determine that best available control technology will be applied. Upon request of the Administrator, the owner or operator of the source shall also provide information on the nature and extent of general commercial, residential, industrial, and other growth which has occurred in the area affected by the source's emissions (such area to be specified by the Administrator) since the effective date of this paragraph.

(4)(i) Where a new or modified source is located on Federal lands, such source shall be subject to the procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be in addition to applicable procedures conducted by the Federal Land Manager for administration and protection of the affected Federal Lands. Where feasible, the Administrator will coordinate his

review and hearings with the Federal Land Manager to avoid duplicate administrative procedures.

(ii) New or modified sources which are located on Indian Reservations shall be subject to procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be administered by the Administrator in cooperation with the Secretary of the Interior with respect to lands over which the State has not assumed jurisdiction under other laws.

(iii) Whenever any new or modified source is subject to action by a Federal agency which might necessitate preparation of an environmental impact statement pursuant to the National Environmental Policy Act (42 U.S.C. 4321), review by the Administrator conducted pursuant to this paragraph shall be coordinated with the broad environmental reviews under that Act, to the maximum feasible and reasonable.

(5) Where an owner or operator has applied for permission to construct or modify pursuant to this paragraph and the proposed source would be located in an area which has been proposed for redesignation to a more stringent class (or the State, Indian Governing Body, or Federal Land Manager has announced such consideration), approval shall not be granted until the Administrator has acted on the proposed redesignation.

(e) *Procedures for public participation.* (1) (i) Within 20 days after receipt of an application to construct, or any addition to such application, the Administrator shall advise the owner or operator of any deficiency in the information submitted in support of the application. In the event of such a deficiency, the date of receipt of the application for the purpose of paragraph (e) (1) (ii) of this section shall be the date on which all required information is received by the Administrator.

(ii) Within 30 days after receipt of a complete application, the Administrator shall:

(a) Make a preliminary determination whether the source should be approved, approved with conditions, or disapproved.

(b) Make available in at least one location in each region in which the proposed source would be constructed, a copy of all materials submitted by the owner or operator, a copy of the Administrator's preliminary determination and a copy or summary of other materials, if any, considered by the Administrator in making his preliminary determination; and

(c) Notify the public, by prominent advertisement in newspaper of general circulation in each region in which the proposed source would be constructed, of the opportunity for written public comment on the information submitted by the owner or operator and the Administrator's preliminary determination on the approvability of the source.

(iii) A copy of the notice required pursuant to this subparagraph shall be sent to the applicant and to officials and agencies having cognizance over the locations where the source will be situated as follows: State and local air pollution control agencies, the chief executive of the city and county; any comprehensive regional land use planning agency; and any State, Federal Land Manager or Indian Governing Body whose lands will be significantly affected by the source's emissions.

(iv) Public comments submitted in writing within 30 days after the date [42517] such information is made available shall be considered by the Administrator in making his final decision on the application. No later than 10 days after the close of the public comment period, the applicant may submit a written response to any comments sub-

mitted by the public. The Administrator shall consider the applicant's response in making his final decision. All comments shall be made available for public inspection in at least one location in the region in which the source would be located.

(v) The Administrator shall take final action on an application within 30 days after the close of the public comment period. The Administrator shall notify the applicant in writing of his approval, conditional approval, or denial of the application, and shall set forth his reasons for conditional approval or denial. Such notification shall be made available for public inspection in at least one location in the region in which the source would be located.

(vi) The Administrator may extend each of the time periods specified in paragraph (e)(1) (ii), (iv), or (v) of this section or such other period as agreed to by the applicant and the Administrator.

(2) Any owner or operator who constructs, modifies, or operates a stationary source not in accordance with the application, as approved and conditioned by the Administrator, or any owner or operator of a stationary source subject to this paragraph who commences construction or modification after June 1, 1975, without applying for and receiving approval hereunder, shall be subject to enforcement action under section 113 of the Act.

(3) Approval to construct or modify shall become invalid if construction or expansion is not commenced within 18 months after receipt of such approval or if construction is discontinued for a period of 18 months or more. The Administrator may extend such time period upon a satisfactory showing that an extension is justified.

(4) Approval to construct or modify shall not relieve any owner or operator of the responsibility to comply with the control strategy and all local, State, and Federal regu-

lations which are part of the applicable State Implementation Plan.

(f) *Delegation of authority.* (1) The Administrator shall have the authority to delegate responsibility for implementing the procedures for conducting source review pursuant to paragraphs (d) and (e), in accordance with subparagraphs (2), (3), and (4) of this paragraph.

(2) Where the Administrator delegates the responsibility for implementing the procedures for conducting source review pursuant to this section to any Agency, other than a regional office of the Environmental Protection Agency, the following provisions shall apply:

(i) Where the agency designated is not an air pollution control agency, such agency shall consult with the appropriate State or local air pollution control agency prior to making any determination required by paragraph (d) of this section. Similarly, where the agency designated does not have continuing responsibilities for land use planning, such Agency shall consult with the appropriate State and local land use planning agency prior to making any determination required by paragraph (d) of this section.

(ii) A copy of the notice pursuant to paragraph (e)(1)(ii)(c) of this section shall be sent to the Administrator through the appropriate regional office.

(3) In accordance with Executive Order 11752, the Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be delegated, other than to a regional office of the Environmental Protection Agency, for new or modified sources which are owned or operated by the Federal government or for new or modified sources located on Federal lands; except that, with respect to the latter category, where new or modified sources are constructed or operated on Federal lands pursuant to leasing or other Federal agreements, the Federal Land Manager may at his discre-

tion, to the extent permissible under applicable statutes and regulations, require the lessee or permittee to be subject to a designated State or local agency's procedures developed pursuant to paragraphs (d) and (e) of this section.

(4) The Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be redelegated, other than to a regional office of the Environmental Protection Agency, for new or modified sources which are located on Indian reservations except where the State has assumed jurisdiction over such land under other laws, in which case the Administrator may delegate his authority to the States in accordance with subparagraphs (2), (3), and (4) of this paragraph.

[FR Doc. 74-28353. Filed 12-4-74; 8:45 am]

[2802] *

[Federal Register, Vol. 40, No. 11—Thursday,
January 16, 1975]

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER C—AIR PROGRAMS

[FRL 321-3]

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION
PLANS

Prevention of Significant Air Quality Deterioration: Correction

In F.R. Doc. 74-28353, published at page 42515 in the issue dated Thursday, December 5, 1974, in § 52.21, paragraph (c)(2)(i), the engineering units “g/m” are incorrectly used to indicate the increases in pollutant concentrations over baseline air quality found in the area designations table. The units are corrected to read “ $\mu\text{g}/\text{m}^3$ ” and are appropriate to all pollutant concentrations in paragraph (c)(2)(i).

Dated: January 9, 1975.

ROGER STRELOW,
*Assistant Administrator
for Air and Waste Management.*

[FR Doc. 75-1364 Filed 1-15-75; 8:45 am]

* Bracketed numbers represent the page in the *Federal Register* upon which material following such a number can be found.

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION
PLANS

[FRL 316-1]

New Jersey Transportation Control Plan; Revisions

On November 13, 1973, EPA published in the *FEDERAL REGISTER* (38 FR 31388) the New Jersey Transportation Control Plan containing plans to reduce parking in the Central Business Districts (CBD's) of the cities of Trenton, Camden and Newark (§ 52.1587). Generally, the CBD of a city is defined as the section wherein land uses involving business, commerce and industrial activities predominate. The CBD usually does not include residential areas.

Representatives of the planning bodies of the three cities have stated that the respective CBD's as presently defined either include large residential tracts or omit substantial sections of the business sector. It was recommended that these definitions be revised to describe the true business districts.

Consequently, in order to achieve the intended effect of the CBD-oriented strategies, EPA is redefining these districts to conform with the definitions submitted by the respective planning agencies.

Because of the importance of proceeding promptly with the planning necessary to carry out the on-street parking limitation program and because the nature of this revision is to more precisely define the areas affected at the request of the cities involved, the Administrator finds good cause to declare the regulations effective immediately upon publication.

(Sec. 110(c), 301(a), Clean Air Act (42 U.S.C. 1857-5(c), 1857(g)))

Dated: January 8, 1975

Part 52 of Chapter I, Title 40, Code of Federal Regulation is amended as follows:

SUBPART FF—NEW JERSEY

1. Section 52.1587 is amended to read as follows:

§ 52.1587 Regulation limiting on-street parking.

• • • • •

(e) For purposes of this section, the CBD's for each of the following cities shall be bounded and described as follows:

(1) *Camden*. Beginning at a point formed by the intersection of US-30 and Mickle Street extended; thence south along Mickle Street, arcing to the south and west, to the intersection of Mickle Street and Third Street; thence north along Third Street to the Benjamin Franklin Bridge; thence east along the line of the Bridge to US-30; thence finally east along US-30, arcing to the east and south, to the intersection of US-30 with Mickle Street extended, the point of beginning. Streets forming boundaries shall be included in the CBD.

(2) *Newark*. Beginning at a point formed by the intersection of Center Street and McCarter Highway (Highway 21); thence north along McCarter Highway to Lombardi Street; thence west along Lombardi Street to Atlantic Street; thence north on Atlantic Street to Bridge Street; thence west on Bridge Street to Broad Street; thence north on Broad Street to Orange Street; thence west on Orange Street to Essex Street; thence north on Essex Street to James Street; thence east of James Street to Washington Street; thence south on Washington Street to Warren Street; thence west on Warren Street to University Avenue; thence south on University Avenue to Market Street; thence west on Market Street to Arlington Street; thence south on Arlington Street

to William Street; thence east on William Street to Broad Street; thence south on Broad Street to Walnut Street; thence east on Walnut Street to Mulberry Street; thence north on Mulberry Street to Park Street; thence west on Park Street to Kitchell Street; thence north on Kitchell Street to Center Street; thence finally east on Center Street to its intersection with McCarter Highway, the point of beginning.

[25004] *

[Federal Register, Vol. 40, No. 114—Thursday,
June 12, 1975]

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER C—AIR PROGRAMS

[FRL 379-1]

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION
PLANS

Prevention of Significant Air Quality Deterioration

On December 5, 1974 (39 FR 42510), the Administrator of the Environmental Protection Agency promulgated final regulations for preventing the significant deterioration of air quality in each state. This notice contains minor amendments to the December 5 promulgation.

All State implementation plans were disapproved with respect to prevention of significant deterioration of air quality in a general disapproval statement set forth in § 52.21(a). In the amendments published below, a specific disapproval is incorporated into the applicable subpart for each state in Part 52 and the general disapproval statement of § 52.21(a) is modified accordingly. Similarly, the specific requirements of paragraphs (c), (d), (e), and (f) in § 52.21 for preventing significant deterioration are incorporated by reference into each subpart. The applicability provisions of § 52.21(c) and (d) are changed accordingly. Although these changes have no substantive effect, they are made so that all approval/disapproval actions and promulgations appear in the appropriate sub-

* Bracketed numbers represent the page in the *Federal Register* upon which material following such a number can be found.

part designated for each State so that all regulations applicable to a particular implementation plan are located in one place.

The definition of "construction" is modified below to remove the reference to "affected facility," since this term is used differently in 40 CFR Part 60 (Standards of Performance for New Stationary Sources) and could create confusion. The definition of "commenced" is modified to be consistent with the definition of that term set forth in Part 60. These changes correct inadvertent errors in the December 5 regulations: no substantive alteration of the regulation is intended by these modifications.

The provisions of § 52.21(c)(3)(ii), which set forth the requirements for redesignating areas, are modified to require consultation with the elected leadership of local and other substate general purpose governments in the area covered by the proposed redesignation. Due to the significant land use implications of these regulations, this provision is being added to ensure that the elected leaders of cities and counties affected by the redesignation have substantial input to the reclassification decision.

The provisions of § 52.21(c)(3)(vi), specifying the standards the Administrator will use in approving or disapproving a request for reclassification, are changed below to require that a State must have requested and received delegation of the new source review before a State may reclassify any area. The previous wording would have permitted a State to reclassify areas, even though their request for delegation might have been unapprovable. Since the intent of this provision was to ensure that a State implement the new source review as a precondition to reclassification, this change is made to be consistent with that intent.

It has come to the Administrator's attention that the above provision could be inequitable in cases where a

State does not have adequate legal authority to accept delegation. Even though a State may be willing to accept the delegation, lack of legal authority may prevent the State from doing so. Therefore, an exemption from this precondition for reclassification is added below for cases where lack of legal authority prevents a State from accepting delegation. The exemption provision added below distinguishes between the administrative/technical functions of the new source review and the enforcement functions. It makes clear that EPA can delegate only the administrative/technical functions and will implement any necessary enforcement functions and that this arrangement will satisfy the requirements for accepting delegation.

Paragraph (c)(1) of the December 5 regulations required States to notify the Administrator by June 1, 1975, of those areas which are pervasively above any national standard for sulfur dioxide or particulate matter and therefore would be exempt from the area classification requirements of paragraph (c). This provision has been modified to remove the [25005] June 1, 1975 date and to allow a State to submit this notification at any time. It should be noted that a State is not required to submit this notification, since the existence of an allowable incremental increase in air quality has little impact in an area that must decrease air quality in order to attain the national standards. Additional guidance for States wishing to exempt an area that pervasively exceeds standards is available from EPA's Regional Offices.

An error in the wording of paragraph (d)(1) is also corrected below; the revised wording indicates that a source which is modified, but does not increase the amount of sulfur oxides or particulate matter, is not subject to the new source review requirements of paragraph (d). In addition, the words at the end of paragraph (d)(3) are changed from "since the effective date of this para-

graph" (i.e., January 6, 1975) to "January 1, 1975." This is to make this wording consistent with the rest of the regulation, which requires that significant deterioration be based on the deterioration occurring since January 1, 1975. Finally, typographical errors in paragraphs (d) and (e) are corrected by inserting the word "extent" in the last phrase of subdivision (d)(4)(iii), and by inserting the phrase "by no more than 30 days" in subdivision (e)(1)(vi). Again, these changes correct minor drafting errors and no change in the scope of the regulations is intended.

The requirements of paragraph (d)(3)(ii)(b) are modified below to require that a State proposing to reclassify an area must notify any Indian Governing Body or Federal Land Manager whose lands may be affected by the reclassification.

Paragraph (f)(2)(i) of the December 5 regulations requires appropriate consultation between air pollution control agencies and land use planning agencies in cases when EPA delegates the new source review requirement to the State or local level. The provisions of paragraph (f)(2)(i) are modified below to require that this consultation involve the State or local agency primarily responsible for managing land use, as opposed to the land use planning agency. Since the required consultation involves actions on individual requests to construct, the Administrator feels it more appropriate for the consultation to involve the agency primarily responsible for implementing any applicable land use plan than the agency responsible for developing the land use plan.

It has come to the Administrator's attention that there is some confusion concerning the need to precisely determine baseline air quality concentrations in all areas of the country. Baseline air quality data are not needed in order to implement the regulations, since significant deterioration is defined in terms of air quality increments

rather than absolute air quality levels. Of course, in Class III areas, the basis for approval or disapproval is related to absolute air quality levels (i.e., the national standards), and in such cases information on existing air quality is needed. However, the approval/disapproval decision as related to possible violations of the national standards is not a new requirement added by the significant deterioration regulations. Such procedures are presently being implemented by most States under their implementation plans, which were approved as meeting the requirements of § 51.18 of this chapter.

The term "baseline air quality" is used in an abstract sense to establish the "starting point" for defining significant deterioration. It is essentially based on air quality as of 1974, although the specific concentration need not be known. To eliminate the confusion generated by the term baseline air quality data, this phrase has been eliminated from the regulation. The language of paragraph (c)(2) has been modified to specify that the Class I and II increments refer to air quality increases occurring since January 1, 1975. However, the impact of sources granted approval to construct or modify prior to January 1, 1975 but which were not yet operating prior to that date, would not be counted against the applicable increments. The language of paragraph (d)(2)(i) has also been modified to be consistent with the above changes. These changes in no way alter the original intent of the regulation.

As indicated in the December 5 preamble, these regulations will be carried out through EPA's Regional Offices in accordance with the provisions of § 52.16, which also lists the addresses of each Regional Office.

The December 5 preamble also indicated that the technical procedures for determining the air quality impact of a new source would generally be based on the following publications: "Guidelines for Air Quality Maintenance

Planning and Analysis," Vols. 10 and 12. These publications, along with the technical support document for the significant deterioration regulations, are available from the National Technical Information Service, 5258 Port Royal Road, Springfield, Va. 22151. Orders should include the publication number and payment as follows:

Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality publication number P. B. 240215/AS, \$5.25.

Vol. 10, "Reviewing New Stationary Sources," publication number 237535/AS, \$4.75.

Vol. 12, "Applying Atmospheric Simulation Models to Air Quality Maintenance Areas," publication number 237750/AS, \$4.25.

The Administrator finds good reason for promulgating these amendments without having first proposed them and for making them effective June 12, 1975, since:

1. The modifications are generally minor clarifications and corrections.
2. The only changes which modify the intent of the December 5 regulations involve minor procedural changes and therefore add no major substantive requirements.

(Secs. 110(c) and 301(a), Clean Air Act as amended (42 U.S.C. 1857-5(c) and 1857g(a)).)

Dated: June 5, 1975.

RUSSELL E. TRAIN,
Administrator.

SUBPART A—GENERAL PROVISIONS

Subpart A, Part 52, Chapter I, Title 40, of the Code of Federal Regulations is amended as follows:

1. Section 52.21 is amended by revising paragraphs (a), (b)(1), (6), and (7), (c)(1), (2)(i), and (iii), (3)(ii)(b) and (vi)(a), (d)(1), (2)(i), (3), and (4)(iii), (e)(1)(vi), and (f)(2)(i); and by adding new paragraphs (c)(3)(ii) (e) and (vi) (f), to read as follows:

§52.21 *Significant deterioration of air quality.*

(a) *Plan disapproval.* Subsequent to May 31, 1972, the Administrator reviewed State implementation plans to determine whether or not the plans permit or prevent significant deterioration of air quality in any portion of any State where the existing air quality is better than one or more of the secondary standards. The review indicates that State plans generally do not contain regulations or procedures specifically addressed to this problem. Specific disapprovals are listed, where applicable, in Subparts B through DDD of this part. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portion of plans approved or promulgated under this part.

(b) *Definitions.* For the purpose of this section:

(1) "Facility" means an identifiable piece of process equipment. A stationary source is composed of one or more pollutant-emitting facilities.

• • • • •

(6) "Construction" means fabrication, erection or installation of a stationary source.

(7) "Commenced" means that an owner or operator has undertaken a continuous program of construction or

modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

(c) *Area designation and deterioration increment.* (1) The provisions of this paragraph have been incorporated by reference into the applicable implementation plans for various States, as provided in Subparts B through DDD of this part. Where this paragraph is so incorporated, the provisions shall also be applicable to all lands owned by the Federal Government and Indian Reservations located in such State. The provisions of this paragraph do not apply in these counties or other functionally equivalent areas that pervasively exceeded any national ambient air quality standards during 1974 for sulfur dioxide or particulate matter and then [25006] only with respect to such pollutants. States may notify the Administrator at any time of those areas which exceeded the national standards during 1974 and therefore are exempt from the requirements of this paragraph.

(2)(i) For purposes of this paragraph, areas designated as Class I or II shall be limited to the following increases in pollutant concentration occurring since January 1, 1975: • • •

(iii) The air quality impact of sources granted approval to construct or modify prior to January 1, 1975 (pursuant to the approved new source review procedures in the plan) but not yet operating prior to January 1, 1975, shall not be counted against the air quality increments specified in paragraph (c)(2)(i) of this section.

(3) • • •

(ii) • • •

(b) Other States, Indian Governing Bodies, and Federal Land Managers whose lands may be affected by the

proposed redesignation are notified at least 30 days prior to the public hearing, and

• • • • •

(e) The redesignation is proposed after consultation with the elected leadership of local and other substate general purpose governments in the area covered by the proposed redesignation.

• • • • •

(vi) • • •

(a) Any redesignation proposed pursuant to subdivisions (ii) and (iii) of this subparagraph shall be approved unless the Administrator determines (1) that the requirements of subdivisions (ii) and (iii) of this subparagraph have not been complied with, (2) that the state has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(d) of this paragraph or (3) that the State has not requested and received delegation of responsibility for carrying out the new source review requirements of paragraphs (d) and (e) of this section.

• • • • •

(f) The requirements of paragraph (c) (3)(vi)(a)(3) that a State request and receive delegation of the new source review requirements of this section as a condition to approval of a proposed redesignation, shall include as a minimum receiving the administrative and technical functions of the new source review. The Administrator will carry out any required enforcement action in cases where the State does not have adequate legal authority to initiate such actions. The Administrator may waive the requirements of paragraph (c)(3)(vi)(a)(3) if the State Attorney-General has determined that the State cannot accept delegation of the administrative/technical functions.

• • • • •

(d) *Review of new sources.* (1) The provisions of this paragraph have been incorporated by reference into the applicable implementation plans for various States, as provided in Subparts B through DDD of this part. Where this paragraph is so incorporated, the requirements of this paragraph apply to any new or modified stationary source of the type identified below which has not commenced construction or modification prior to June 1, 1975. A source which is modified, but does not increase the amount of sulfur oxides or particulate matter emitted, or is modified to utilize an alternative fuel, or higher sulfur content fuel, shall not be subject to this paragraph.

• • • • •

(2) • • •

(i) The effect on air quality concentration of the source or modified source, in conjunction with the effects of growth and reduction in emissions after January 1, 1975, of other sources in the area affected by the proposed source, will not violate the air quality increments applicable in any other areas. The analysis of emissions growth and reduction after January 1, 1975, or other sources in the areas affected by the proposed source shall include all new and modified sources granted approval to construct pursuant to this paragraph; reduction in emissions from existing sources which contributed to air quality during all or part of 1974; and general commercial, residential, industrial, and other sources of emissions growth not exempted by paragraph (c)(2)(iii) of this section which has occurred since January 1, 1975.

• • • • •

(3) In making the determinations required by paragraph (d)(2) of this section, the Administrator shall, as a minimum, require the owner or operator of the source subject to this paragraph to submit: site information; plans, description, specifications, and drawings showing

the design of the source; information necessary to determine the impact that the construction or modification will have on sulfur dioxide and particulate matter air quality levels; and any other information necessary to determine that best available control technology will be applied. Upon request of the Administrator, the owner or operator of the source shall also provide information on the nature and extent of general commercial, residential, industrial, and other growth which has occurred in the area affected by the source's emissions (such area to be specified by the Administrator) since January 1, 1975.

(4) . . .

(iii) Whenever any new or modified source is subject to action by a Federal Agency which might necessitate preparation of an environmental impact statement pursuant to the National Environmental Policy Act (42 U.S.C. 4321), review by the Administrator conducted pursuant to this paragraph shall be coordinated with the broad environmental reviews under that Act, to the maximum extent feasible and reasonable.

(e) . . .

(1) . . .

(vi) The Administrator may extend each of the time periods specified in paragraphs (e)(1)(ii), (iv), or (v) of this section by no more than 30 days or such other period as agreed to by the applicant and the Administrator.

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(f) . . .

(2) . . .

(i) Where the agency designated is not an air pollution control agency, such agency shall consult with the appropriate State and local air pollution control agency prior to making any determination required by paragraph (d) of this section. Similarly, where the agency designated does

not have continuing responsibilities for managing land use, such agency shall consult with the appropriate State and local agency which is primarily responsible for managing land use prior to making any determination required by paragraph (d) of this section.

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SUBPART B—ALABAMA

2. Subpart B is amended by adding § 52.60 as follows:

§ 52.60 Significant deterioration of air quality.

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21 (b), (c), (d), (e) and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Alabama.

SUBPART C—ALASKA

3. Subpart C is amended by adding § 52.96 as follows:

§ 52.96 Significant deterioration of air quality.

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Alaska.

SUBPART D—ARIZONA

4. Subpart D is amended by adding § 52.144 as follows:

§ 52.144 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable [25007] implementation plan for the State of Arizona.

SUBPART E—ARKANSAS

5. Subpart E is amended by adding § 52.181 as follows:

§ 52.181 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Arkansas.

SUBPART F—CALIFORNIA

6. Subpart F is amended by adding § 52.269 as follows:

§ 52.269 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of California.

SUBPART G—COLORADO

7. Subpart G is amended by adding § 53.343 as follows:

§ 52.343 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Colorado.

SUBPART H—CONNECTICUT

8. Subpart H is amended by adding § 52.382 as follows:

§ 52.382 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Connecticut.

SUBPART I—DELAWARE

9. Subpart I is amended by adding § 52.432 as follows:

§ 52.432 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Delaware.

SUBPART J—DISTRICT OF COLUMBIA

10. Subpart J is amended by adding § 52.499 as follows:

§ 52.499 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the District of Columbia.

SUBPART K—FLORIDA

11. Subpart K is amended by adding § 52.530 as follows:

§ 52.530 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Florida.

SUBPART L—GEORGIA

12. Subpart L is amended by adding § 52.581 as follows:

§ 52.581 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Georgia.

SUBPART M—HAWAII

13. Subpart M is amended by adding § 52.632 as follows:

§ 52.632 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Hawaii.

SUBPART N—IDAHO

14. Subpart N is amended by adding § 52.683 as follows:

§ 52.683 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Idaho.

SUBPART O—ILLINOIS

15. Subpart O is amended by adding § 52.738 as follows:

§ 52.738 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Illinois.

SUBPART P—INDIANA

16. Subpart P is amended by adding § 52.793 as follows:

§ 52.793 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Indiana.

SUBPART Q—IOWA

17. Subpart Q is amended by adding § 52.833 as follows:

§ 52.833 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, [25008] since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Iowa.

SUBPART R—KANSAS

18. Subpart R is amended by adding § 52.884 as follows:

§ 52.884 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Kansas.

SUBPART S—KENTUCKY

19. Subpart S is amended by adding § 52.931 as follows:

§ 52.931 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Kentucky.

SUBPART T—LOUISIANA

20. Subpart T is amended by adding § 52.985 as follows:

§ 52.985 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Louisiana.

SUBPART U—MAINE

21. Subpart U is amended by adding § 52.1029 as follows:

§ 52.1029 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include pro-

cedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Maine.

SUBPART V—MARYLAND

22. Subpart V is amended by adding § 52.1116 as follows:

§ 52.1116 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Maryland.

SUBPART W—MASSACHUSETTS

23. Subpart W is amended by adding § 52.1161 as follows:

§ 52.1161 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made

a part of the applicable implementation plan for the State of Massachusetts.

SUBPART X—MICHIGAN

24. Subpart X is amended by adding § 52.1180 as follows:

§ 52.1180 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Michigan.

SUBPART Y—MINNESOTA

25. Subpart Y is amended by adding § 52.1234 as follows:

§ 52.1234 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Minnesota.

SUBPART Z—MISSISSIPPI

26. Subpart Z is amended by adding § 52.1280 as follows:

§ 52.1280 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Mississippi.

SUBPART AA—MISSOURI

27. Subpart AA is amended by adding § 52.1339 as follows:

§ 52.1339 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Missouri.

SUBPART BB—MONTANA

28. Subpart BB is amended by adding § 52.1382 as follows:

§ 52.1382 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include pro-

cedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Montana.

SUBPART CC—NEBRASKA

29. Subpart CC is amended by adding § 52.1436 as follows:

§ 52.1436 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable [25009] implementation plan for the State of Nebraska.

SUBPART DD—NEVADA

30. Subpart DD is amended by adding § 52.1485 as follows:

§ 52.1485 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made

a part of the applicable implementation plan for the State of Nevada.

SUBPART EE—NEW HAMPSHIRE

31. Subpart EE is amended by adding § 52.1529 as follows:

§ 52.1529 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of New Hampshire.

SUBPART FF—NEW JERSEY

32. Subpart FF is amended by adding § 52.1603 as follows:

§ 52.1603 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of New Jersey.

SUBPART GG—NEW MEXICO

33. Subpart GG is amended by adding § 52.1634 as follows:

§ 52.1634 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of New Mexico.

SUBPART HH—NEW YORK

34. Subpart HH is amended by adding § 52.1689 as follows:

§ 52.1689 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of New York.

SUBPART II—NORTH CAROLINA

35. Subpart II is amended by adding § 52.1778 as follows:

§ 52.1778 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of North Carolina.

SUBPART JJ—NORTH DAKOTA

36. Subpart JJ is amended by adding § 52.1829 as follows:

§ 52.1829 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of North Dakota.

SUBPART KK—OHIO

37. Subpart KK is amended by adding § 52.1884 as follows:

§ 52.1884 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Ohio.

SUBPART LL—OKLAHOMA

38. Subpart LL is amended by adding § 52.1929 as follows:

§ 52.1929 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Oklahoma.

SUBPART MM—OREGON

39. Subpart MM is amended by adding § 52.1987 as follows:

§ 52.1987 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include pro-

cedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Oregon.

SUBPART NN—PENNSYLVANIA

40. Subpart NN is amended by adding § 52.2058 as follows:

§ 52.2058 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Pennsylvania.

SUBPART OO—RHODE ISLAND

41. Subpart OO is amended by adding § 52.2083 as follows:

§ 52.2083 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a

part of the applicable implementation plan for the State of Rhode Island.

SUBPART PP—SOUTH CAROLINA

42. Subpart PP is amended by adding § 52.2131 as follows:

§ 52.2131 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, [25010] since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of South Carolina.

SUBPART QQ—SOUTH DAKOTA

43. Subpart QQ is amended by adding § 52.2178 as follows:

§ 52.2178 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of South Dakota.

SUBPART RR—TENNESSEE

44. Subpart RR is amended by adding § 52.2233 as follows:

§ 52.2233 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Tennessee.

SUBPART SS—TEXAS

45. Subpart SS is amended by adding § 52.2303 as follows:

§ 52.2303 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Texas.

SUBPART TT—UTAH

46. Subpart TT is amended by adding § 52.2346 as follows:

§ 52.2346 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include pro-

cedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Utah.

SUBPART UU—VERMONT

47. Subpart UU is amended by adding § 52.2380 as follows:

§ 52.2380 Significant deterioration of air quality.

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Vermont.

SUBPART VV—VIRGINIA

48. Subpart VV is amended by adding § 52.2451 as follows:

§ 52.2451 Significant deterioration of air quality.

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a

part of the applicable implementation plan for the State of Virginia.

SUBPART WW—WASHINGTON

49. Subpart WW is amended by adding § 52.2497 as follows:

§ 52.2497 Significant deterioration of air quality.

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Washington.

SUBPART XX—WEST VIRGINIA

50. Subpart XX is amended by adding § 52.2528 as follows:

§ 52.2528 Significant deterioration of air quality.

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of West Virginia.

SUBPART YY—WISCONSIN

51. Subpart YY is amended by adding § 52.2581 as follows:

§ 52.2581 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Wisconsin.

SUBPART ZZ—WYOMING

52. Subpart ZZ is amended by adding § 52.2630 as follows:

§ 52.2630 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Wyoming.

SUBPART AAA—GUAM

53. Subpart AAA is amended by adding § 52.2676 as follows:

§ 52.2676 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for Guam.

SUBPART BBB—PUERTO RICO

54. Subpart BBB is amended by adding § 52.2729 as follows:

§ 52.2729 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by ref- [25011] erence and made a part of the applicable implementation plan for Puerto Rico.

SUBPART CCC—VIRGIN ISLANDS

55. Subpart CCC is amended by adding § 52.2779 as follows:

§ 52.2779 **Significant deterioration of air quality.**

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include pro-

cedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for the Virgin Islands.

SUBPART DDD—AMERICAN SAMOA

56. Subpart DDD is amended by adding § 52.2827 as follows:

§ 52.2827 Significant deterioration of air quality.

(a) The requirements of section 101(b)(1) of the Clean Air Act are not met, since the plan does not include procedures for preventing the significant deterioration of air quality.

(b) *Regulation for preventing significant deterioration of air quality.* The provisions of § 52.21(b), (c), (d), (e), and (f) are hereby incorporated by reference and made a part of the applicable implementation plan for American Samoa.

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

Tennessee: Disapproval of Legal Authority

On May 31, 1972 (37 FR 10842), the Administrator approved portions of the Tennessee plan to attain and maintain the national ambient air quality standards. At that time, the plan was disapproved as failing to satisfy the requirements of 40 CFR 51.11(a)(3) since the State lacked legal authority to control motor vehicle activity

during emergency episodes of air pollution. It has since come to the attention of the Administrator that there are other deficiencies in the State's legal authority to enforce the emission limiting regulations of its approved plan. The purpose of the present notice is to describe these deficiencies and to clarify the Agency's intentions in their regard.

On September 13, 1973, in Opinion No. 52, rendered to the Tennessee Department of Public Health, the State's Assistant Attorney General, C. Hayes Cooney, ruled that: (1) State agencies are not included in the definition of "person" as found in section 53-3409(f) of the Tennessee Code Annotated; and (2) State agencies are not subject to local air pollution regulations adopted pursuant to a private act which does not specifically provide for regulation of a State agency. These opinions were reiterated in a letter of January 24, 1974, from the Tennessee Attorney General's office to the Agency's Region IV office. Since the State of Tennessee lacks legal authority to enforce its emission limiting regulations in the case of facilities owned or operated by the State, the Administrator hereby disapproves the plan in this particular. Elsewhere in this publication, the Administrator proposes for incorporation in the Tennessee plan a definition of "person" which includes sources owned or operated by the State. It is the Administrator's intention to enforce, in the case of State-owned or operated facilities, the existing emission limits of the approved Tennessee plan, including those enacted by local governments, as needed to assure attainment and maintenance of all national ambient air quality standards in the State, and as called for by the original control strategies of the State's plan.

On July 3, 1974, the Technical Secretary of the Tennessee Air Pollution Control Board informed the Agency's Regional Administrator that the Tennessee Air Pollution Control Division had ceased to have legal authority to

control: (1) agricultural limestone production, through the enactment of Tennessee House Bill 1490 on February 21, 1974; and (2) woodwaste boilers, through the enactment of Tennessee House Bill 1845 on March 22, 1974. Accordingly, the Administrator hereby disapproves the Tennessee plan as lacking legal authority to control these two categories of sources. It is the Agency's intention to enforce, in the case of such sources, the existing emission limiting regulations of the approved Tennessee plan, including those enacted by local governments, as needed to assure the attainment and maintenance of all national ambient air quality standards in Tennessee, and as called for by the original control strategies of the State's plan.

These actions are effective July 14, 1975.

(Sec. 110(a), Clean Air Act (42 U.S.C. 1857e-5(a)))

Dated: June 6, 1975.

RUSSELL E. TRAIN,
Administrator.

Part 52 of Chapter I, Title 40, Code of Federal Regulations, is amended as follows:

SUBPART RR—TENNESSEE

In § 52.2224, paragraphs (c), (d), and (e) are added as follows:

§ 52.2224 Legal authority.

• • • • •
(c)(1) The requirements of § 51.11(a)(2) of this chapter are not met since the definition of "person" set forth in the Tennessee Air Quality Act and in the State implementation plan does not include facilities owned or operated by the State. Therefore, section 52-3409(f) of the Tennessee Code Annotated and section 30 of Chapter II of the Tennessee Air Pollution Control Regulations are disapproved.

(d) The requirements of § 51.11(a)(2) of this chapter are not met since the State lacks legal authority, as a result of the enactment of House Bill 1490 by the 1974 Tennessee legislature, to control emissions from the quarrying and processing of agricultural limestone. Therefore, section 53-3424 of the Tennessee Code Annotated is disapproved.

(e) The requirements of § 51.11(a)(2) of this chapter are not met since the State lacks legal authority, as a result of the enactment of House Bill 1845 by the 1974 Tennessee legislature, to control emissions from air contaminant sources which use woodwaste only as fuel. Therefore, the last sentence of section 53-3422 of the Tennessee Code Annotated is disapproved.

[42011] *

[Federal Register, Vol. 40, No. 176—Wednesday,
September 10, 1975]

Title 40—Protection of Environment

[FRL 418-2]

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER C—AIR PROGRAMS

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION
PLANS

Prevention of Significant Air Quality Deterioration

On December 5, 1974 (39 FR 42510) the Administrator of the Environmental Protection Agency published final regulations for the prevention of significant deterioration of air quality applicable in all 55 states and territories. The plan for preventing significant deterioration, as set forth on December 5, 1974, is implemented through a preconstruction review of major stationary sources to determine if construction of such sources in a particular area would cause a violation of specified air quality increments. On June 9, 1975 (40 FR 24534) the Administrator proposed the addition of ferroalloy production facilities to the list of sources subject to the preconstruction review. That notice also described the criteria the Administrator intends to use in adding further sources in the future. These criteria are:

(1) A new source performance standard for sulfur dioxide (SO₂) or particulate matter has been established for the source or any facility of the source under Part 60

* Bracketed numbers represent the page in the *Federal Register* upon which material following such a number can be found.

of this chapter, and (2) The established new source performance standard will allow any anticipated future plant affected by the standard to emit SO₂ or particulate matter in excess of 25 pounds per hour from the affected facility or facilities when operating at maximum design capacity.

As new source performance standards are proposed, they will be examined to determine if, based on the allowable emission limit and the expected size of new plants, the 25 pounds per hour criterion would be exceeded. Where the affected facility or facilities could exceed this criterion, the proposal of the new source performance standards will also include a proposal to add such plants to the list of sources subject to the significant deterioration review; however, only those new plants which will exceed the 25 pounds per hour emission limitation will be required to undergo the preconstruction review.

Only ferroalloy production facilities were proposed to be added at this time, since they are the only source not already subject to the significant deterioration regulation which meet the above criteria. No restrictions were placed on the size ferroalloy production facility subject to the review, since all plants from this source category affected by the new source performance standard are expected to be of sufficient size to exceed the emission limitation criterion.

Only one comment¹ indicating agreement, was received on the June 9, 1975, proposal. Therefore, the Administrator is promulgating this action essentially as proposed, except for the addition of a provision making the preconstruction review for ferroalloy production facilities applicable only to such facilities commencing construction after October 5, 1975, instead of the June 1, 1975, date specified for the other 18 source categories. In the Administrator's judgment, it would be inequitable to make the regulation retroactive to June 1, 1975, for a source category that is

only now being added to the list of sources subject to review.

Also in this notice, several minor corrections are being made to rectify errors that appeared in EPA's June 12, 1975, promulgation of miscellaneous amendments to the significant deterioration regulations.

These regulations will be effective October 5, 1975.

(Sections 110(c), 301(a) of the Clean Air Act as amended (42 U.S.C. 1857c-5(c) 1857g(a))).

Dated: September 4, 1975.

JOHN QUARLES,
Acting Administrator.

[42012]

SUBPART A—GENERAL PROVISIONS

Subpart A, Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

§ 52.21 [Amended]

1. In § 52.21, paragraph (d) is revised by adding the phrase, "except as specifically provided below", after the end of the second sentence of paragraph (d)(1). Also in paragraph (d)(1), the following subdivision is added in proper order:

"(xix) Ferroalloy production facilities commencing construction after October 5, 1975.

FEDERAL REGISTER Doc. 75-15414, published on June 12, 1975, is corrected as follows:

2. On page 25006, § 52.21 is corrected by inserting the phrase "the air quality increments applicable in the area where the source will be located nor" after the word "violate" in the first sentence of paragraph (d)(2)(i). Also, the second sentence of paragraph (d)(2)(i) is corrected by changing the word following the date "January 1, 1975," from "or" to "of".

3. On page 25006, five asterisks should be inserted following the amendatory language of § 52.21(d)(4)(iii), thus denoting that existing subparagraph (5) of paragraph (d), as promulgated on December 5, 1974 (39 FR 42510), remains unchanged.

§ 52.269 [Amended]

§ 52.985 [Amended]

4. On page 25007, §§ 52.269 and 52.985 and redesignated as §§ 52.270 and 52.986, respectively.

5. On page 25008, § 52.1161 is redesignated as § 52.1165.

[FR Doc. 75-23950 Filed 9-9-75; 8:45 am]

[FRL 413-2]

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION
PLANS

Revision to the Virgin Islands Implementation Plan

On May 31, 1972 (37 FR 10905), and March 8, 1973 (38 FR 6280), pursuant to section 110 of the Clean Air Act (42 U.S.C. 1857c-5(a)), and 40 CFR Part 51, the Administrator disapproved portions of the Virgin Islands implementation plan because the plan: (1) did not adequately provide a means for the preconstruction review of new or modified stationary sources if said construction or modification would interfere with the attainment and maintenance of national standards; and (2) did not provide for the preconstruction review or modification of indirect sources if said construction or modification would interfere with the maintenance of national standards.

On October 28, 1972 (37 FR 23092), the Administrator promulgated a regulation to correct the deficiency with regard to the preconstruction and modification review of stationary sources of air pollution. On February 25, 1974 (39 FR 7276) EPA promulgated a Federal indirect source review regulation (40 CFR 52.22(b)) to be incorporated into the implementation plans of those States and territories (including the Virgin Islands) which had failed to submit their own approvable indirect source regulations. This regulation was amended on July 9, 1974 (39 FR 25293).

On February 12, 1974 the Governor of the Virgin Islands submitted proposed revisions to the Virgin Islands implementation plan which consisted of sections 206-30 (Review of new sources and modification) and section 206-31 (Review of new or modified indirect sources) of the Virgin Islands Air Pollution Control Code. Additional information was received from the Assistant Di-

rector of the Division of Environmental Health, Department of Conservation and Cultural Affairs on April 10, 1975. This information was intended to result in the revocation of the EPA disapproval notices of May 31, 1972 and March 8, 1973 by providing for a review procedure prior to construction of new or modified direct and indirect sources of air pollution.

These regulations were subject to Department of Health public hearings on September 10, and 11, 1973 and became legally effective in December 1974 after their publication in the Virgin Islands Register, Volume XV, No. 1. The materials submitted in support of the plan revision include information submitted by the Governor on February 12, 1973 and information submitted by the Assistant Director, Department of Conservation and Cultural Affairs on April 10, 1975 as follows:

- (1) A notice of public hearings held on September 10 and 11, 1973;
- (2) A certification from the Assistant Director that public hearings were held on September 10 and 11, 1973;
- (3) Section 206-30 of the Virgin Islands Air Pollution Control Code;
- (4) Section 206-31 of the Virgin Islands Air Pollution Control Code;
- (5) Copies of sections 206-30 and 206-31 as received from the Equity Publishing Company showing that the regulations were published as part of the Virgin Islands Register, Volume XV, No. 1, dated December, 1974.

The Environmental Protection Agency published in the Federal Register of April 9, 1974 (39 FR 12872), a notice which announced receipt of the proposed revisions to the Virgin Islands plan and which provided the opportunity for a 30-day public comment period on these proposed re-

visions. The public comment period ended on May 9, 1974 and no comments were submitted to the Agency.

The Administrator has reviewed the proposed revisions and has determined that section 206-30 does not meet all of the EPA requirements regarding revisions to implementation plans and is, therefore, only approvable in part. While subsections 206-30(f)(1)-(5) clearly and specifically list many types of stationary sources which will be exempt from preconstruction review, subsection 206-30(f)(6) adds a general exemption for any sources which the Territory determines to be "of minor significance." EPA approval of such an undefined class of exempt sources would clearly be improper under section 110 of the Clean Air Act, since the Territory could in effect substantively amend its implementation plan on an ad hoc basis without EPA approval. Subsection 206-30(f)(6) is therefore being disapproved.

In addition, section 206-30 does not meet the public comment/agency analysis requirements of 40 CFR 51.18 (h). The Administrator, as part of this notice is promulgating a regulation which will insure that the requirements of 40 CFR 51.18(h) are met.

Section 206-31, which requires the preconstruction review of indirect sources of air pollution, is being approved. It should be noted that the Federal indirect source regulation promulgated in 1974 for the Virgin Islands and most other states (40 CFR 52.22(b)) requires that large highways and airports be subjected to photochemical oxidant and nitrogen dioxide impact review, while the Virgin Islands regulation considers carbon monoxide impact only. The Administrator is taking no action to disapprove the Virgin Islands regulation in this regard, however, since the Federal regulation is currently not effective. See 40 FR 28064, July 3, 1975. Moreover, EPA must conduct additional rulemaking to set forth

oxidant-nitrogen dioxide impact review procedures before the Federal regulation becomes effective as to highways and airports. See 40 FR 28065, July 3, 1975; 39 FR 25295, July 9, 1974. At such time as EPA completes its oxidant-nitrogen dioxide rulemaking and reinstates the provisions of 40 CFR 52.22(b) as to highways and airports, EPA would be required to promulgate such highway-airport review requirements into the Virgin Islands plan if the plan still does not contain such requirements.

It should also be noted that today's approval of the Virgin Islands indirect source regulation is in no way intended to compromise the validity of EPA's indefinite suspension of the parking-related aspects of its own indirect source regulation, 40 CFR 52.22(b), announced on July 3, 1975 (40 FR 28064). As stated in that announcement, the suspension related to the Federal review regulation only; the Administrator continues to encourage the States to develop their own indirect source regulations and to submit them to EPA for approval.

The Administrator will not subject the correction of section 206-30 promulgated below to additional rulemaking, since all that is involved is a technical correction to the Virgin Islands implementation plan which insures that the procedural requirements of 40 CFR 51.18(h) will be met.

Effective date: These revisions become effective October 10, 1975.

(42 U.S.C. 1857c-5 and 1857g(a))

Dated: September 4, 1975.

JOHN QUARLES,
Acting Administrator.

[FR Doc. 75-23949 Filed 9-9-75; 8:45 am]

SUPREME COURT OF THE UNITED STATES

No. 76-529 •

MONTANA POWER COMPANY, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.

ORDER ALLOWING CERTIORARI. FILED April 4, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia—Circuit is granted, limited to the following questions: 1. Whether regulations promulgated by the Environmental Protection Agency to prevent the significant deterioration of air quality are authorized by the Clean Air Act; 2. Whether the Clean Air Act permits the Environmental Protection Agency to adopt regulations which grant to federal land managers and Indian governing bodies power to reclassify federal and Indian lands within their jurisdiction. The case is consolidated with Nos. 76-585, 76-594, 76-603, 76-619 and 76-620 and a total of one and one-half hours is allotted for oral argument.

Mr. Justice Powell took no part in the consideration or decision of this petition.

• A corresponding order was entered by this Court in Nos. 76-585, 76-594, 76-603, 76-619, and 76-620.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

Supreme Court, U. S.

FILED

DEC 20 1976

MICHAEL RODAK, JR., CLERK

No. 76-529

MONTANA POWER COMPANY, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.,
Respondents.

and Nos. 76-585, 76-594, 76-619, 76-603, 76-620

On Petitions for Writs of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

**BRIEF FOR INTERVENOR RESPONDENTS
IN OPPOSITION**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-529

MONTANA POWER COMPANY, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.,
Respondents.

No. 76-585

AMERICAN PETROLEUM INSTITUTE, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

No. 76-594

INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.,
Respondents.

No. 76-619

UTAH POWER & LIGHT COMPANY, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
 ET AL.,
Respondents.

No. 76-603

ALABAMA POWER COMPANY, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

No. 76-620

WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES,
 ET AL.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
 ET AL.,
Respondents.

**On Petitions for Writs of Certiorari to the United States
 Court of Appeals for the District of Columbia Circuit**

**BRIEF FOR INTERVENOR RESPONDENTS
 IN OPPOSITION ¹**

OPINION BELOW

The opinion of the court of appeals has been officially reported at 540 F.2d 1114. It is set out as an appendix to several of the Petitions for Writs of Certiorari.²

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1976. Petition, No. 76-529, App. C. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the requirement of the Clean Air Act that the clean air resources of the Nation be protected from significant deterioration should be reconsidered by this Court when it has been twice determined by the Court of Appeals for the District of Columbia Circuit, has received judicial approval from several other courts of appeals, has been ratified by the Congress, and is fully supported by the Act and by its legislative history.

2. Whether the Clean Air Act, in its prohibition against the significant deterioration of existing air quality, or the regulations promulgated to carry out the Act violate any constitutional prohibition.

¹ The intervenor respondents are the Sierra Club, the Oregon Environmental Council, Susan L. Moore, Sally Rodgers, Stephen Winter, and John Tanton.

² References to the court of appeals opinion and judgment will hereafter be made to the appendix to the petition in No. 76-529.

3. Whether the regulations are arbitrary and capricious because the pollution increments established by them are not directly related to specific adverse effects or because there are not sufficient data and modeling techniques to make them workable.

4. Whether the regulations, insofar as they allow federal agencies managing federal lands to designate these areas in such a manner as to allow less degradation of air quality, are arbitrary and capricious.

5. Whether the procedures followed by the Environmental Protection Agency in promulgating the regulations to prevent significant deterioration of air quality were in conformity with the Clean Air Act.

STATUTE AND REGULATIONS INVOLVED

Excerpts from the Clean Air Act, 42 U.S.C. 1857, *et seq.*, are set out in the Petition, No. 76-529, Appendix E. The regulations, 40 C.F.R. 52.01(d), (f) and 52.21, are also set out in that Petition, Appendix B.

STATEMENT

Respondents adopt the Statement set out in the Petition for a Writ of Certiorari, No. 76-617, *Sierra Club, et al. v. Environmental Protection Agency, et al.*

ARGUMENT

1. The industry petitioners seek to have this Court determine that the Clean Air Act of 1970 does not authorize the Environmental Protection Agency to prevent significant deterioration of air quality. In short, they seek the overturn of *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253 (D.D.C. 1972), affirmed per curiam, 4 ERC 1815, affirmed by an equally divided Court *sub nom.*

Fri v. Sierra Club, 412 U.S. 541 (1973). This determination was reaffirmed by the court below.³ We submit that the decisions were correct and need not be reviewed by this Court.

As the court of appeals noted Petition, No. 76-529, pp. 17a-18a) the policy of preventing significant deterioration was part of the clean air statute even before 1970. The National Air Pollution Control Administration, the predecessor of EPA, adopted Guidelines for the Development of Air Quality Standards and Implementation Plans in 1969 that stated (Section 1.51):

[A]n explicit purpose of the Act is "to protect and enhance the quality of the Nation's air resources." Air quality standards which, even if fully implemented, would result in significant deterioration of air quality in any substantial portion of an air region clearly would conflict with this expressed purpose of the law.

During the hearings on the 1970 amendments, Undersecretary Veneman of HEW (which then enforced the 1967 statute) presented Secretary Finch's statement to both Houses:⁴

[O]ne of the express purposes of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources." Accordingly it has been and will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with this provision of the Act. We shall continue to ex-

³ The two decisions of the court of appeals were unanimous. The judges who participated were McGowan, Robb, Danaher, Wright, Robinson, and Wilkey.

⁴ Hearings on Air Pollution before the Subcommittee on Air and Water Pollution of the Senate Public Works Committee, 91st Cong., 2d Sess. 132-133 (1970); Hearings on Air Pollution Control and Solid Waste Recycling before the Subcommittee on Public Health and Welfare of the House Interstate and Foreign Commerce Committee, 91st Cong., 2d Sess. 297 (1970).

pect states to maintain air of good quality where it now exists.

After presenting this statement to the Senate Committee, Undersecretary Veneman expanded upon it, adding:⁵

We do not intend to condone "backsliding." If an area has air quality which is better than the national standards, they would be required to stay there and not pollute the air even further, even though they may be below national standards.

The Undersecretary then was asked by Senator Cooper:⁶

I notice some place in your statement * * * you said that if a region or an area had a certain air quality which might be higher than other areas of the country, that that would be maintained. It could not be degraded; is that correct?

Mr. Veneman. Yes. We pointed out we did not want deterioration of the air in those areas that may be below what the standard is at the present time.

During the House hearings on the 1970 legislation, a witness for the chemical industry urged the committee to modify the provisions which he described as an unqualified prohibition of degradation.⁷ In response, Congressman Rogers stated:⁸

If we pursue that philosophy where we say we are not going to do anything in the clean area where we know it will contribute to the environment then we simply set the stage for allowing that area to be polluted up to the point where we have to come in in a drastic way later, whereas if we start with

⁵ Senate Hearings, *supra*, p. 143.

⁶ *Id.* at 159.

⁷ House Hearings, *supra*, p. 465.

⁸ *Id.* at 475.

any clean air areas and try to keep them clean then we don't have to go back like we are thinking of doing now * * *.

The Senate Report on the 1970 amendments made clear that no state implementation plan permitting significant deterioration of air quality should be approved:⁹

In areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality. Once such national goals are established, deterioration of air quality should not be permitted except under circumstances where there is no available alternative. Given the various alternative means of preventing and controlling air pollution—including the use of the best available control technology, industrial processes, and operating practices—and care in the selection of sites for new sources, land use planning and traffic controls—deterioration need not occur.

As a result, after Congress in 1970 readopted the language of the 1967 Act (Section 101(b)), EPA adopted National Primary and Secondary Ambient Air Quality Standards which provide (40 C.F.R. 50.2(c)):

The promulgation of national primary and secondary air quality standards shall not be considered in any manner to allow significant deterioration of existing air quality in any portion of any State.

The chief sponsor of the 1970 amendments, Senator Muskie declared in opening the 1973 hearings to review the implementation of that policy:¹⁰

⁹ S. Rep. No. 1196, 91st Cong., 2d Sess. 11 (1970).

¹⁰ Nondegradation Policy of the Clean Air Act, Hearings before the Subcommittee on Air and Water Pollution of the Senate Public Works Committee, 93d Cong., 1st Sess. 1 (1973).

[T]he policy of nondegradation * * * was incorporated into the 1967 Air Quality Act. It was not altered in the 1970 clean air amendments. The Environmental Protection Agency's predecessor for air pollution, the National Air Pollution Control Administration defined this policy in guidelines in 1969. EPA initially proposed a nondegradation policy in guidelines for air quality implementation plans in 1971. Subsequently, EPA deleted this policy from those guidelines and a court challenge ensued. The courts have upheld the intent of the act. Nondegradation is national policy.

In the most recent session of Congress, amendments to the Clean Air Act were proposed and extensively debated. Although there were some differences between the House and Senate versions, both of which passed the respective bodies by substantial margins, each preserved the nondegradation policy in a form much like the EPA regulations.¹¹ The report accompanying the House measure stated:¹²

The Committee has developed this section to provide clearer definition of the nearly decade-old policy (reflected in section 101(b) of the Act) that significant deterioration of clean air must be avoided * * *.

The report then carefully chronicled the enactment and implementation of the policy. It noted that EPA's 1971 adoption of guidelines for implementation plans which would have permitted degradation of air quality to the level of the national standards constituted a "sudden

¹¹ The Senate bill, S.3219, passed by a vote of 78 to 13. The House bill, H.R. 10498, was approved by a vote of 324 to 68. The conference bill failed to be considered because of a filibuster on the last day of the Congress by four Senators which prevented it from coming to the floor before the previously agreed upon adjournment date. 122 Cong. Rec. S17574 (daily ed. Oct. 1, 1976).

¹² H. Rep. No. 1175, 94th Cong., 2d Sess. 83 (1976).

reversal or a policy previously recognized by the Administration and by the Congress since 1967 * * *." *Id.* at 84.

The Senate report was equally firm:¹³

A nondegradation policy was articulated first in Federal water pollution law. That was in 1965. The concept was incorporated into the 1967 Air Quality Act, which stated that a basic purpose of the Act was to "protect and enhance the quality of the Nation's air resources." That language was not altered by the 1970 Clean Air Amendments. This bill clarifies and details that policy.

The report then quoted from the 1970 Senate report which it said, "identified the tools necessary to implement a policy to prevent significant deterioration." *Ibid.* The 1976 report further cited the guidelines of the National Air Pollution Control Administration, which defined the policy and EPA's original standards which similarly carried it out. *Ibid.*

These statements put to rest the claims raised by industry petitioners that the Clean Air Act does not authorize the prevention of significant deterioration. Even Congressional opponents of the 1976 amendments, which would have enacted into the statute a regulatory structure substantially like, and in some ways identical to, the EPA regulations, generally did not deny the existence of the basic policy.¹⁴ Senator Moss, who sought to

¹³ S. Rep. No. 717, 94th Cong., 2d Sess. 20 (1976).

¹⁴ The petition in No. 76-529 cites (Pet. 21, note 13) several statements by opponents of the 1976 bill who declared that such a policy had not been intended by the Congress in 1970. Five of those cited were not members of Congress in 1970 and therefore are not in a position to say what was intended.

In any event, this Court has repeatedly pointed out that it is to the sponsors of legislation, not to the opponents, to which one must look for the "authoritative guide to the construction of legislation." *Schegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395

amend the bill to provide merely for a one-year study of nondegradation, nonetheless expressly affirmed the policy's existence and would have left in place the current EPA regulations pending later Congressional action. 122 Cong. Rec. 6667 (daily ed. May 6, 1976).

As the court of appeals stated, "[w]e find, in the legislative history of the Clean Air Act of 1970, a clear understanding that the Act embodied a pre-existing policy of nondeterioration of air cleaner than the national standards." Petition No. 76-529, p. 17a. Both the contemporaneous and the subsequent history fully support that conclusion.

2. The decision of the court of appeals upholding EPA's authority and duty to adopt the regulations at issue is entirely consistent with the decisions of this Court and with those of every other court of appeals which has considered the issue.¹⁵ The industry petitioners argue strenuously that three decisions of this Court establish the principle that only those factors specifically enumerated in Section 110 of the Act, 42 U.S.C. 1857c-5, may be required in a state implementation plan and that therefore no provisions governing the prevention of significant deterioration of air quality may be prescribed by EPA.¹⁶ The court below rejected this argument, pointing

(1951). Accord, *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 288 (1956); *NLRB v. Fruit and Vegetable Packers*, 377 U.S. 58, 66 (1964).

¹⁵ Four other courts of appeals have expressed their agreement with the Court of Appeals for the District of Columbia Circuit. *NRDC v. EPA*, 489 F.2d 390, 408 (C.A. 5, 1974), reversed on other grounds *sub nom. Train v. NRDC*, 421 U.S. 60; *Big Rivers Electric Corp. v. EPA*, 523 F.2d 16 (C.A. 6, 1975); *NRDC v. EPA*, 507 F.2d 905, 913 (C.A. 9, 1974); *Union Electric Co. v. EPA*, 515 F.2d 206, 220 (C.A. 8, 1975), affirmed on other grounds, — U.S. —, 96 S.Ct. 2518 (1976).

¹⁶ *Train v. NRDC*, 421 U.S. 60 (1975), *Hancock v. Train*, 96 S.Ct. 2006 U.S. (1976), and *Union Electric Co. v. EPA*, — U.S. —, 96 S.Ct. 2518.

out that the issues in those cases were entirely different since they concerned what could be required in an implementation plan addressed to cleaning up dirty air rather than what could be required to protect existing clean air. Petition No. 76-529, p. 26a.

Like most of the detailed provisions of the Act, Section 110 was focused primarily on the immediate need to meet the crisis caused by high levels of air pollution in certain areas of the country. Earlier legislation had given primary responsibility to the States to prevent and control pollution, through determining both the air quality standards they would require and the time in which to meet them. See *Train v. NRDC*, *supra*, 421 U.S. at 65. However, "the response of the States to these manifestations of increasing concern with air pollution was disappointing. * * * Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970 * * *." *Id.* at 64. The "stick" was a set of explicit requirements—standards, limitations, deadlines and procedures—with which the States had to comply.

Many of these requirements are contained in Section 110. Since these are addressed to the problem of existing pollution, the measures required would necessarily have a heavy impact on existing sources.¹⁷ In view of these potential effects, as well as the fact that less clearly articulated measures had been ineffective, Congress set forth carefully the sorts of restrictions it was mandating.

In contrast, the provision in Section 101(b) requiring the protection of the Nation's existing, relatively clean air resources applies to future pollution and therefore only to future sources which might be introduced into

¹⁷ This Court has referred to the 1970 Amendments as "a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution." *Union Electric Co. v. Environmental Protection Agency*, *supra*, 96 S.Ct. at 2525.

clean air areas. Congress chose not to set forth detailed measures to control this pollution and left such measures to EPA. Nonetheless, as we have noted, Congress was specifically told by the Administration, that, despite the changes in the Act, it continued its basic protective purpose as to clean air areas. It would be anomalous and illogical to adopt this "stick" in the form of stricter standards and detailed requirements in Section 110 and elsewhere in order to force positive action to clean up the air resources and simultaneously give up the protection of clean air which had existed even under the earlier, less strict statute. There is nothing in the statute or in its legislative history which would support imputing such an inconsistent result to the Congress.

The decisions of this Court cited by the industry petitioners merely hold that the list of requirements in Section 110 of the Act concerning state implementation plans is exclusive in dealing with the problem of cleaning up dirty air. None of these decisions considers the issue of significant deterioration of existing clean air at all. That requirement is based on Section 101(b) of the Act. Once the courts determined that Section 101(b) prohibits significant deterioration, this required, as a matter of the appropriate remedy, that the states include effective provisions to carry out this statutory requirement in their implementation plans. This remedy—of provisions in state implementation plans—has been adopted both by EPA and by the Congress in the legislation passed in both Houses.

3. Some of the industry petitioners claim that the authority given to EPA to protect the nation's air resources is insufficiently defined by the Clean Air Act, and hence constitutes an unconstitutional delegation of legislative power. The basic, oft-repeated rule regard-

ing legislative delegation is contained in *Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928):¹⁸

If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.

Similarly, in *City of Eastlake v. Forest City Enterprises Inc.*, — U.S. —, 44 Law Week 4919, 4921 (1976), this Court explained:

Courts have frequently held in other contexts that a congressional delegation of power to a regulatory entity must be accompanied by discernible standards, so that the delegatee's action can be measured for its fidelity to the legislative will.

There are clearly "an intelligible principle" and "discernible standards" involved in this case. Congress made clear that the principle and standards for measuring EPA's actions were to be the protection of existing clean air.

As we have seen, it was carefully explained to both Houses of Congress during their consideration of the 1970 Amendments that the term "protect * * * the quality of the Nation's air resources" contained in section 101(b) of the Act meant that significant deterioration of existing air quality must be prevented. Indeed, the language of the district court in *Sierra Club v. Ruckelshaus* was little more than an elaboration on the administrative interpretation which EPA and its predecessor agency had originally taken. The delegation of congressional power is thus plainly within the limits ap-

¹⁸ This language was recently cited by this Court as stating the basic test in *FEA v. Algonquin SNG Inc.*, — U.S. —, 96 S.Ct. 2295 (1976). See also *National Cable Television Assn. v. United States*, 415 U.S. 336, 342 (1974).

proved by this Court in *Lichter v. United States*, 334 U.S. 742, 785 (1947), quoting from *Hampton*: "Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied. 'They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear.' "

4. Some of the industry petitioners urge that the regulations are improper in that they infringe upon the powers of the States in violation of the Tenth Amendment to the Constitution. It is well established that the regulation of air pollution is within the power of the federal government under the commerce clause of the Constitution. See Petition No. 76-529, p. 48a and cases cited at note 77. This court has recently stated (*National League of Cities v. Usery*, — U.S. —, 96 S. Ct. 2465, 2468 (1976)):

It is established beyond peradventure that the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress.

Thus the regulations are valid unless they violate some specific prohibition of the Constitution. One such prohibition is stated in the *Usery* decision, *supra*, 96 S.Ct. at 2475: "Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." Such an incursion on state functions is plainly absent here.

The regulations, in fact, require nothing of the States. If the States take no positive action, the review of new polluting sources which is necessary to ensure that the applicable pollution increments are not exceeded will be carried out by EPA. 40 C.F.R. 52.21(f). If a State chooses to conduct such review, it must request delega-

tion of this power.¹⁹ Similarly, if the State wishes to exercise its powers under the regulations to redesignate lands within its jurisdiction to more or less restrictive increment classifications, it is free to do so providing the procedural steps are followed and the State has the source review power which is necessary to ensure that the applicable increments, whatever they may be, will be met. 40 C.F.R. 52.21(c)(3)(ii), (vi)(a). Until the State chooses to seek and use this power, the clean air areas will remain Class II, a classification "applied to areas in which deterioration normally accompanying moderate well-controlled growth would be considered insignificant." 39 Fed. Reg. 42510.

None of these acts, which the States may, but need not, take, is in any way akin to the "coerced state policing" found offensive in *District of Columbia v. Train*, 521 F.2d 971 (C.A. D.C. 1975), certiorari granted, 44 Law Week 3681. Rather, the regulations here fit within the type of action approved by the court of appeals in the *District of Columbia* case (*id.* at 994, note 27):

The principle at work here is not that the states have an interest in keeping the federal government from regulating * * * but rather that they are to be protected from federal compulsion to exercise state governmental functions in an area where they choose to remain inactive. Since the federal government acts under its commerce power when it enforces its own regulations * * *, direct federal regulation by definition involves no intrusion on state sovereignty whatsoever.

Similarly, here the federal government can enforce its own regulations.

¹⁹ Review of new pollution sources is required by Section 110(a)(2)(D), 42 U.S.C. 1857c-5(a)(2)(D), so that the State can determine whether a new source will prevent attainment or maintenance of the national standards. The States therefore have such review mechanisms and procedures already established.

5. The industry petitioners claim that the regulations are arbitrary and capricious on a variety of grounds. We submit that none of these arguments represents a substantial claim.

The regulations establish a reasonable system of protecting existing clean air by setting certain limits on the additional pollution which may be emitted into that air in the future.²⁰ The congressional mandate to protect clean air unlike the national standards relating to existing pollutants, is not related to specific, known, quantified adverse effects. The prevention of significant deterioration is a policy of prudence for the future, enacted in the light of an awareness of likely, and even known but unquantified, adverse effects on human health, animals, vegetation, materials, and visibility, which are caused by air pollution at low levels.²¹ In setting the

²⁰ Intervenor respondents submit, however, that the regulations fail to comply with the Clean Air Act insofar as they (1) allow the establishment of Class III areas, where any increase in pollution is permitted as long as the national standards are not exceeded, and (2) fail to control pollution by four of the six regulated pollutants. See Petition, No. 76-617.

²¹ Expert testimony before the Congress for several years prior to passage of the 1970 Amendments had emphasized that there is no threshold level below which air pollution is not harmful to health. For example, Dr. G. Hoyt Whipple of the University of Michigan testified in 1968 that threshold levels are merely a convenience so that "one can sleep nights" but that "most threshold levels are, from a scientific point of view, artifacts of the limits of measuring techniques or of the experimental design." Hearings on Air Quality Criteria, 90th Cong., 2d Sess. 598 (1968). Similarly, Dr. John Middleton, Commissioner of the National Air Pollution Control Administration pointed out that "to identify a no-known effects level is something that would be, in my opinion, not only extremely difficult but very likely not possible." Hearings on Air Pollution before the Subcommittee on Air and Water Pollution of the Senate Public Works Committee, 91st Cong., 2d Sess. 1489 (1970).

Reflecting these warnings, the Senate report on the 1970 Act admitted that "a great deal of basic research will be needed to determine the long-term air quality goals which are required to

Class I and II increments, EPA has adopted a system which can accommodate both the desire for maximum retention of clean air and the need to allow for additional industrial growth.

The extent to which this system carries out the purpose of the Congress is amply demonstrated by the fact that the 1976 amendments adopted by the House and the Senate, while differing in some details, are both patterned directly on the EPA regulations and adopt an increment and classification system. In the case of the Senate bill, S. 3219, the identical Class I and II increments of EPA were adopted. The House version, H.R. 10498, chose an increment system based on percentages of the national standards, but the resulting figures were virtually the same as the EPA increments for Class I and II. Thus, Congress clearly approved the increment

protect the public health and welfare from any potential effects of air pollution." S. Rep. No. 1196, 91st Cong., 2d Sess. 11. In explaining the need for Section 103(f) of the Act, which provides for special emphasis on research on air pollution effects, the report pointed out that, while there is enough knowledge of acute effects to develop standards, "our knowledge of some of the chronic effects involving extended exposure over a period of years is limited." S. Rep. No. 1196, *supra*, p. 7. Senator Muskie later explained that the "standards as set under the 1970 act were conceived of as possible threshold standards. It was more a hope than a certainty." Hearings on Implementation of Transportation Controls before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 93d Cong., 1st Sess. 225 (1973).

This concern with protecting public health from presently unquantified adverse effects is expressed again in H. Rep. No. 1175, 94th Cong., 2d Sess. 85 (1976), which states that

the need to prevent significant deterioration in so-called "clean air areas" arises in substantial part from the need to protect the public's health. * * * [I]t is * * * clear that a combination of ambient standards with a policy for prevention of significant deterioration of air quality is necessary to provide for maximum feasible protection of the public health. * * * The margins of safety, purportedly ensured by the standards, seem to have vanished in the face of new data.

and classification system as an appropriate method for carrying out the protection of clean air.

6. The industry petitioners also challenge the power granted by the regulations to federal land managers²² and Indian tribes to adopt a stricter air quality classification as to lands over which they exercise jurisdiction.²³ We submit that the ability of federal land managers and Indian tribes to control air quality in such lands as national parks and forests and Indian reservations is an appropriate, even necessary, adjunct of their general authority to preserve those areas. Moreover, this redesignation power is quite limited. The regulations provide for an elaborate, detailed process for redesignation, including public hearing and extensive consultation with any governmental or other groups which might be affected. 40 C.F.R. 52.21(c)(3)(iv), (v). In addition, any redesignation must be reviewed and approved by the Administrator of EPA, at which time protests may be made. 40 C.F.R. 52.21(c)(vi). These procedures ensure that redesignations will not take place arbitrarily or without careful consideration of the potential effects.

7. Finally, some of the industry petitioners urge that this Court should review the decision below on the ground that new hearings were not held in every State prior to the promulgation of the regulations. As the court of appeals pointed out, every State held hearings prior to adoption of their implementation plans. Petition No. 76-529, p. 43a. Many, if not most, of these hearings included discussion of a need to prevent significant deterioration of existing clean air. When, however, the

²² The federal land manager is defined as "the head, or his designated representative, of any Department or Agency of the Federal Government which administers federally-owned land, including public domain lands." 40 C.F.R. 52.21(b)(3).

²³ Indian tribes are also given the authority to designate a less strict classification. 40 C.F.R. 52.21(c)(3)(v).

individual state plans adopted pursuant to these hearings failed to implement that purpose effectively, they were disapproved by the Administrator in accordance with the order of the district court in *Sierra Club v. Ruckelshaus*, *supra*. 37 Fed. Reg. 23836. Since Section 110 of the Act only requires hearings prior to submission of the implementation plan, the court below correctly concluded that there was no requirement to hold a new set of hearings in each State. Petition, No. 76-529, p. 43a.

In the course of developing regulations which would carry out this purpose, EPA held five regional hearings and received numerous written comments. 39 Fed. Reg. 31000. Further written comments were received and considered after the draft regulations were issued in August 1974. See 39 Fed. Reg. 42510. All interested persons had full and repeated opportunity at all stages of the adoption of the implementation plans to present their views. None of the petitioners made any objection to EPA that it should be holding hearings in every State. It is clear, as the court below pointed out, that there is no claim of harm to any party by this procedure, (Petition, No. 76-529, p. 44a), nor was any objection to it raised. There is therefore no ground for invalidating these regulations. Consequently, even if petitioners were correct that a second set of hearings was required in every state, they are not entitled to use this issue where they failed to complain to the Administrator at a time when a deficiency could have been corrected. *United States v. L. A. Tucker Truck Lines*, 344 U.S. 33, 36-37 (1951).

CONCLUSION

In short, the decision below is not in conflict with decisions of this Court or any court of appeals. The issues raised by the industry petitioners are not substantial and do not warrant review by this Court. For the foregoing reasons, intervenor respondents submit that the petitions for writs of certiorari filed by the industry petitioners should be denied.²⁴

Respectfully submitted,

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²⁴ On the other hand, the petition filed by the Sierra Club, No. 76-617, raised an important question of federal law which has not been decided by this Court—whether the Environmental Protection Agency has properly complied with its statutory obligation under the Clean Air Act to prevent the significant deterioration of air quality.

DEC 21 1976

MICHAEL RODAK, JR., CLERK

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AGENCY, ET AL.,
Respondents.

**CONSOLIDATED BRIEF IN OPPOSITION TO PETI-
TION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

Nos. 76-529, 76-585, 76-594, 76-603

MONTANA POWER COMPANY, ET AL.,
Petitioners,
v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.,
Respondents.

**CONSOLIDATED BRIEF IN OPPOSITION TO PETI-
TION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

The New Mexico Environmental Improvement Agency prays that writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit requested by peti-

tioner in Case Nos. 76-529, 76-585, 76-594, and 76-603 be denied.*

OPINION BELOW

The opinion of the Court of Appeals is officially reported at 540 F.2d 1114 (1976). It is also set out as Appendix A to the Petition for a Writ of Certiorari in No. 76-529 which was filed by Montana Power Company and fourteen other petitioners.**

QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency (EPA) acted beyond the scope of its authority under the Clean Air Act of 1970 (the Clean Air Act) in promulgating regulations for the prevention of significant deterioration of air quality (PSD Regulation).

2. Whether the procedures followed by EPA in promulgating the regulations complied with the Clean Air Act.

* This brief is filed in opposition to the positions taken by Montana Power Company, et al., in No. 76-529; American Petroleum Institute, et al., in No. 76-585, Indiana-Kentucky Electric Corporation, et al., in No. 76-594, and Alabama Power Company, et al., in No. 76-603. The State of New Mexico ex rel. New Mexico Environmental Improvement Agency filed a petition for review in No. 75-1370 below on issues other than those objected to herein. Insofar as respondent can determine the parties to the consolidated proceedings below that will also be adverse respondents to the foregoing petitions are the United States Environmental Protection Agency, its Administrator (Russell E. Train), Sierra Club, the Washington Metropolitan Coalition for Clean Air, New Mexico Citizens for Clean Air and Water, Oregon Environmental Council, Sally Rodgers, John Tanton, Suzan L. Moore, Stephen Winter and the State of Nevada.

** Hereafter, the appendices to the petitions in the numbers cited in the caption above are designated as Petition, No. —, App. —.

3. Whether the regulations are arbitrary and capricious on the ground that they are not directly related to specific adverse effects or on the ground that adequate data and modeling techniques do not exist to make them workable.

4. Whether the Clean Air Act, by prohibiting significant deterioration of existing air quality and the regulations violate any constitutional prohibition.

REASONS FOR DENYING THE WRIT

The following reasons deal with the issues presented by the Petitioners as a basis of their request for this Court to consider the lower court's decision. The reasons presented are the basis for the respondents opposition to the petitioners request.

I

EPA Did Not Act Beyond Its Authority in Promulgating The Regulations

The district court in *Sierra Club v. Ruckelshaus* (App. A at 1a) ordered the Administrator to "[d]isapprove any portion of a state plan which fails to effectively prevent the significant deterioration of existing air quality in any portion of any state." Since the Administrator under Section 110 of the Clean Air Act is already required to disapprove a plan that does not provide for the "enhancement" of dirty air (Petition, No. 76-529, App. A at 101a), the court order provides another reason for the disapproval of a plan.

Petitioners¹ rely heavily on the decisions of this Court in *Train v. NRDC*, 421 U.S. 60 (1975), *Union*

¹ Petition, No. 76-529 at 27-30; Petition, No. 76-585 at 8-12; Petition, No. 76-594 at 6-11; Petition, No. 76-603 at 11.

Electric Co. v. EPA, — U.S. —, 44 U.S.L.W. 5060 (June 25, 1976), and a statement made in *Hancock v. Train*, — U.S. —, 44 U.S.L.W. 4765 (1976) to support their contention that the criteria established in Section 110 concerning the reduction of pollution which exceeds the national standards are the only ones which relates to approval of implementation plans by EPA. They further argue that these decisions are inconsistent with the holding in *Sierra Club v. Ruckelshaus*, thus implicitly overruling it.²

The Court below in considering the decision in *Train v. NRDC* based on similar arguments made by Petitioner said:

Unlike the instant case, *Train* was concerned with air pollution below the national standards, and the question was whether individual variances would prevent the states from achieving the standards within the prescribed time limits. The Supreme Court in *Train* did not consider the issue of non-deterioration, even though the decision below was based in part on *Sierra Club v. Ruckelshaus*. Rather than assume, as the industrial petitioners would have us, that *Train* silently overturned the earlier divided affirmance in *Sierra Club*, we find it more reasonable to conclude that the Court did not address the issue, and we reject the argument based on *Train*. Petition, No. 76-529, App. A at A-28.

Also, in reviewing this Court's decision in *Union Electric Co. v. EPA*, the lower court said:

Although the Court stressed the "shall approve" language of Section 110(a)(2), its construction was founded on a concern that the congressional

² Id.

mandate of prompt implementation of pollution control plans not be disserved. The Court was not presented with the distinct question whether the "shall approve" language of Section 110(a)(2) must be read to subvert the concomitant congressional directive that significant deterioration of air cleaner than the national standards be prevented. Thus, despite the emphasis placed on (a) (2) by the opinions in *Train v. NRDC* and *Union Electric*, we do not believe the result in the instant case is controlled by either opinion. Petition, No. 76-529, App. A at 29a.

It should be noted that the lower court in *Union Electric* expressly pointed out that the state "may also be required to assure the nondegradation of air quality which exceeds the national standards." *Supra* at 220. This Court made no comment on this statement in its opinion.

The Clean Air Act states a policy of protecting clean air and the congressional testimony of HEW Secretary Finch and Undersecretary Venaman, and the Senate report, as set out in the lower court's opinion (Petition, No. 76-529, App. A at 20, 21), show that the adoption of Section 110 in 1970 did not change that policy. It would indeed be unfortunate if the 1970 Amendments which Congressman Rodgers described as legislation in which Congress "has committed itself in the strongest possible terms to bringing about clean air in America" (116 Cong. Rec. 42522; 1 Leg Hist. 118) would be construed to allow significant degradation of this nation's clean air.

II

**EPA Procedures in Promulgating the Regulations Complied
With the Requirements of the Act**

Indiana-Kentucky Electric Corp., et al., in Petition, No. 76-594, make two main arguments in challenging the procedures followed by EPA in promulgating the regulations for the prevention of significant deterioration:

1. EPA did not give states an opportunity to revise their implementation plans before the Agency promulgated its own regulations, *id.* at 11, and
2. EPA failed to hold hearings in every state before the promulgation of these regulations, *id.* at 12.

**A. THE REGULATIONS ARE NOT INVALID ON THE GROUND
THAT EPA DID NOT GIVE STATES AN OPPORTUNITY
TO REVISE THEIR IMPLEMENTATION PLANS**

Petitioners rely upon Section 110(a)(2)(H) of the Act. That section provides for revisions in state implementation plans to be made by the states. Petition, No. 76-529, App. E at 103a.

Section 110(a) in general sets forth procedures for the formulation, revision, submission to EPA and approval or disapproval by EPA of new and revised plans. If a new or revised plan is disapproved by EPA, Section 110(c) provides for the promulgation by EPA of new or revised regulations which add to or replace all or portions of the plan (see Petition, No. 76-529, App. E at 101a through 106a).

The procedures for revisions to the implementation plan are essentially the same as for the development

of the plan. Both involve formulation by the states and changes by the Administrator only if required by the Act. However, they differ in that one relates to the original adoption of a plan meeting the requirements of the Act and the other concurs subsequent revision to an approved plan as are necessary or desirable to assure continued compliance with the Act.

The PSD regulations issued by the Administration relates to the original states implementation plans. The district court in *Sierra Club v. Ruckelshaus* ordered the Administrator to disapprove all original states implementation plans if they failed to effectively prevent significant deterioration, App. A at 1a. All state implementation were disapproved by the Administrator on November 9, 1972, insofar as they related to significant deterioration of existing air quality. 37 Fed. Reg. 23826. The present regulations were issued in November 1974 as part of the original state implementation plans, rather than revisions as that term is used in the Act. Section 110(a)(2)(H) and (c)(3) is therefore inapplicable.

Petitioners' argument would require that all additions to or modifications of state plans by EPA resulting from the disapproval of the plans be treated as revisions, invoking the procedures of 110(a)(2)(H) and 110(c)(3). This would render Section 110(c)(2) totally meaningless. That section allows the Administrator to promulgate his own regulations when the state plan does not carry out the substantive requirements of the Act. In contrast, Section 110(c)(3) permits the Administrator to issue regulations if the state has not adequately revised its plan. If any EPA modification of state plans, after their disapproval, is considered as a revision, Section 110(c)(2) has no meaning.

Furthermore, the district court ordered the Administrator and not the states to prepare regulations. There is no mention in the order of notification to the states to make revisions. If the court had intended that the states were to be given an opportunity to revise their implementation plans before EPA acted, it is likely that the court would have provided more than six months time.

Moreover, the regulations represent the minimum requirements necessary to prevent significant deterioration of air quality and does not prevent states from promulgating as strict or stricter regulations.³

B. THE REGULATIONS ARE NOT INVALID ON THE GROUNDS THAT EPA FAILED TO HOLD HEARINGS IN EVERY STATE PRIOR TO PROMULGATING THE REGULATIONS

The Clean Air Act does not make public hearings mandatory in every state before promulgation of regulations by EPA can become part of all state imple-

³ The preamble to the PSD regulations proposed on August 27, 1976 states:

To facilitate development of State plans to implement the general policy set forth in these regulations in the near future the Administrator intends to publish guidelines for the preparation, adoption, and submittal of State Implementation Plan provisions with respect to the prevention of significant deterioration (40 C.F.R. 51). These additional guidelines will provide criteria for submission of State plans to prevent significant deterioration. The State plans need not be identical to the regulations proposed herein, but should be developed to accommodate more appropriately individual conditions and procedures unique to specific State and local areas. States are urged to develop and submit individual plans as revisions to State Implementation Plans as soon as possible. When individual State Implementation Plan revisions are approved as adequate to prevent significant deterioration of air quality, the applicability of the regulations proposed herein will be withdrawn for that State. [39 Fed. Reg. 31000.]

mentation plans. The relevant section of the Act provides:

If such state held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such state on any proposed regulation.⁴

It is clear that from this provision that EPA must provide an opportunity for a public hearing within the state of a proposed regulation only if the state failed to hold a public hearing before promulgating its implementation plan or revision.

Every state in the country held hearings with regard to its implementation plan by 1972.⁵ The hearings in each state constituted a "public hearing associated with regard to such plan * * *". Therefore, in promulgating the PSD regulations, EPA was not required under Section 110(d) to hold new hearings in each state.

Notwithstanding that hearings were not held in every state prior to this promulgation of the PDS regulations, the procedures followed by EPA went well beyond the informal rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. 553, and gave all members of the public and industry adequate opportunity to present their views concerning the proposed regulations. The original proposed regulations were published in the Federal Register on July 16, 1973. 38 Fed. Reg. 18986. EPA also held hearings in

⁴ Section 110(c)(1), Petition, No. 76-529, App. E at 196a.

⁵ EPA published initial approval or disapproval of all state implementation plans by May 31, 1972. 37 Fed. Reg. 10842.

August and September, 1973 in five different cities across the United States, and solicited comments from specific individuals and groups. 39 Fed. Reg. 31000.

It is clear that the lack of hearings in every state before promulgation of the PSD regulations did not violate the Act or deny the public the right to comment in the proposed regulations.

III

The Regulations Are Not Arbitrary and Capricious

A. THE AIR QUALITY DETERIORATION INCREMENTS ARE NOT ARBITRARY AND CAPRICIOUS

Petitioners⁶ argue that the Class I and Class II increments are arbitrary and capricious on the ground that the Classes are not directly linked to specific adverse effects.⁷

New Mexico agrees with the position taken by the Sierra Club in Petition, No. 76-617⁸ concerning the Class III increment allowed by the PSD regulation. However, with respect to the other increments, the lack of a direct relationship with harm to health and welfare does not render the regulations unlawful.

The regulations allow for some variance in the level of air quality across the country by defining the maxi-

⁶ Petition, No. 76-585 at 21, 22 and Petition, No. 76-603 at 12.

⁷ Class III increment under the PSD regulations allows any amount of degradation up to the national standards. 40 CFR, 52(e)(2)(ii).

⁸ The Sierra Club Petition pending before this Court is not being opposed in this brief. Rather New Mexico believes the position taken by the Sierra Club in their petition concerning the Class III increment, *id.* at 9-11, to be correct.

mum amounts of additional pollution which may be considered relatively insignificant.

The court below noted that the term "significant deterioration" was not defined by the district court in *Sierra Club v. Ruckelshaus*, but left the definition to the EPA.⁹ Nor does the legislative history of the Act or the Act itself define the term. However, the structure of the Act suggests that the meaning of "significant" should not be tied to the secondary standards. The national primary and secondary standards are by definition quantified estimates of measured effects of pollution on health and welfare.¹⁰ Therefore, one goal of EPA in the promulgation of the PSD regulations could be to protect against undetected, unquantified, or unquantifiable effects of air pollution. 38 Fed. Reg. 18987. Rather than guard against undetected or unquantified effects of air pollution, and thus prohibit any increase in pollution, EPA chose another solution. EPA's solution, as stated by the lower court, was:

[a] definition created by its own implementation; each state's evaluation of the relative importance of the competing interests which surround continued maintenance of air quality will determine what level of deterioration would be significant for that state. The three classifications thus are not intended to represent a scientific conclusion as to what constitutes significant deterioration; rather, they are suggested frameworks for use by the states after independent evaluation. Because the regulations do not purport to be mandatory

⁹ Petition, No. 76-529, App. A at 42a.

¹⁰ § 109, 43 U.S.C. § 1857 c-4, Petition, No. 76-529, App. E at 99a. Also see generally Comment, II: *State Implementation Plans and Air Quality Enforcement*, 4 Ecology L.Q. 595, 597-598.

requirements based on scientific research, they properly cannot be judged by asking whether the increments are related to demonstrated health effects. [Petition, No. 76-529, App. A at 42a].

Petitioners point to no alternative method of defining significant deterioration of air quality other than permitting air to deteriorate to the level of clear, quantifiable harm.

EPA's approach to preventing significant deterioration by establishing the Class I and Class II increments is reasonable and supported by recent Senate and House passed bills (S. 3219 and H. R. 10498, 94th Cong.) as well as a compromise provision.¹¹

Thus, the Class I and Class II increments of the PSD regulations appear to set reasonable limits on deterioration of existing clean air.

B. ADEQUATE DATA AND MODELING TECHNIQUES EXIST TO IMPLEMENT THE REGULATIONS

Petitioners in No. 76-585 at 24, 25, have objected that available modeling techniques are inadequate to predict with precision what effect a proposed new source will have on the ambient air and therefore on the Class designation for its area.

The regulations provide that prevention of significant deterioration in designated clean air areas should be enforced chiefly through the preconstruction review of new and modified sources. 40 C.F.R. 52.21(d). EPA suggests the use of diffusion modeling techniques

¹¹ The Conference bill failed of passage in both Houses prior to adjournment, *sine die*. See H.R. No. 94-1742 reprinted at 122 Cong. Res. No. 150 (Pt. 2) at H 11959-94 (daily ed.). Specifically H 11970-73, 11987-88.

to predict if a proposed new source will violate the allowable increment for the area and to keep track of the unused increment.

EPA acknowledges that existing techniques for modeling are not entirely accurate but states (39 Fed. Reg. 31003):

It should also be noted, however, that data obtained from current diffusion modeling techniques, while not corresponding to actual conditions in the ambient air, do provide a consistent and reproducible guide which can be used in comparing the relative impact of a source.

The method of air quality management in Section 110 of the Act depends on the use of some type of model for relating emissions to air quality.¹²

In *Texas v. EPA*, 499 F.2d 289 (1974), the Court of Appeals for the Fifth Circuit, in considering EPA's reliance on atmospheric models, said:

In the absence of sophisticated information, the EPA has been forced to rely on crude assumptions. We cannot object, for it is not our role to judge whether the EPA's projections are accurate, but only whether they represent arbitrary or capricious exercises of its authority. Necessity, which has mothered the EPA's invention of this model, also protects it from a judicial insistence on greater reliability. Decisions which are not arbitrary and capricious in the light of existing knowledge may become so by dint of scientific advance. By its use of estimations and sparse data, the EPA

¹² § 110(a)(2)D and 110(a)4, Petition, No. 76-529 at 102a, 104a. These sections require that state implication plans include a preconstruction review procedure similar to that required in the PSD regulations.

creates a continuing responsibility to develop, review and apply updated and more sophisticated information.

It is clear that should model inaccuracy be the basis for invalidating the PSD regulations the control of air pollution through modeling techniques, as employed under § 110 of the Clean Air Act, may be endangered.

IV

The Clean Air Act and the PSD Regulations Are Not Unconstitutional

A. THE ACT AND THE REGULATIONS ARE WITHIN THE POWERS GRANTED UNDER THE COMMERCE CLAUSE

Petitioners in No. 76-585 at 17, 18 argue that under the Commerce Clause the Congress has no authority to require prevention of significant deterioration of existing air quality.

This Court has repeatedly recognized this broad sweep of the power Congress has over commerce.¹³ In addition, several circuit courts have found that air pollution has an effect upon commerce and therefore can be regulated by Congress.¹⁴

Both Congress and the courts have recognized that air pollution recognizes no boundaries and is by defini-

¹³ *Gibbons v. Ogden*, 9 Wheat 1, 196 (1824); *North America Co. v. Securities and Exchange Comm.*, 327 U.S. 686, 705 (1945); *Heart of Atlanta Motel v. U.S.*, 399 U.S. 241, 255 (1964); *Maryland v. Wirtz*, 392 U.S. 183, 190 (1968).

¹⁴ *Pennsylvania v. EPA*, 500 F.2d 246, 259 (C.A. 3, 1974); *Accord South Terminal Corp. v. EPA*, 504 F.2d 646, 677 (C.A. 1, 1974); *District of Columbia v. Train*, — F.2d —, — (C.A.D.C., 1975).

tion a part of interstate commerce.¹⁵ Given that air pollution control is within the commerce power of Congress, control of air pollution via PSD regulations would similarly be within power.

B. THE ACT AND THE REGULATIONS DO NOT VIOLATE THE FIFTH AMENDMENT

Petitioners in No. 76-585 at 23, 24, argue that the Act and regulations violate substantive due process because they bear no relationship to the protection of health and welfare.

This Court has repeatedly held that if the laws are not arbitrary and bear a reasonable relationship to a proper legislative purpose then the requirements of due process are not violated.¹⁶

Section 101(b) provides that the purpose of the Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." Petition, No. 76-529, App. E at 97a.

There are harms to the public health and welfare at air quality levels below the secondary standards which are impossible to quantify.¹⁷

¹⁵ § 101(a)(2) of the Act, Petition, No. 76-529, App. E at 97a; *South Terminal Corp. v. EPA*, *supra*, 504 F.2d at 667; *United States v. Bishop Processing Co.*, 287 F. Supp. 624, 629 (D. Md. 1968), affirmed 423 F.2d 469 (C.A. 4), Certiorari denied, 398 U.S. 904 (1970).

¹⁶ *Nebbia v. New York*, 291 U.S. 502, 537 (1934); *West Coast Hotel v. Parrish*, 300 U.S. 379, 391 (1939); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253-259.

¹⁷ EPA has stated that:

Limitations on air quality that result in cleaner air than the national ambient air quality standards cannot * * * be

Congress, consistent with the due process clause of the Fifth Amendment, can properly prohibit significant deterioration of existing clean air even though existing scientific information does not establish the pollution levels below the national standards that might harm the public. Such a decision, to prevent unknown but possible harm, surely bears a reasonable relationship to a proper legislative purpose.

C. THE ACT AND REGULATIONS DO NOT VIOLATE THE TENTH AMENDMENT

Petitioners Nos. 76-585 at 15 and 76-603 at 11 argue that the Act, if it authorizes the PSD regulations, violates the Tenth Amendment by assuming the right of the states to regulate land use. This Court in *United States v. Darby*, 312 U.S. 100, 114 (1940), has made it clear that any activity within the state police power does not preclude regulations at the federal level based on the commerce clause.¹⁸

The Court of Appeals for the Ninth Circuit recently held in *Brown v. EPA*, 521 F.2d 527, 538 (1975), certiorari granted, — U.S. —, (1976), that Congress has in the Clean Air Act exercised its power

based on any quantitative measure of harm to either public health or welfare. This is not, however, to say that there are no possible unquantified adverse effects on public health or welfare below the levels of the national standards. Examples of such unquantified effects involve the transformation of sulfur dioxide into suspended sulfates and sulfuric acid aerosols, resulting in possible effects on health, visibility, climatic changes, acidity of rain, and deterioration of materials. *Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality, U. S. Environmental Protection Agency, Office of Air Quality Planning and Standards* (January 1975), at 6.

¹⁸ Also see discussion under IV A above.

under the commerce clause to exclude state regulation of interstate commerce.

[T]he State's exercise of its police power must not improperly burden interstate commerce * * *. With this proposition no one differs * * *. [I]n the area of control of air pollution federal law has preempted state law * * *.

Moreover the prohibition against significant deterioration of air quality in the statute and regulations has no greater effect on land use than other restrictions imposed by the Act. Thus, the petitioners arguments constitute an attack upon the constitutionality of the entire Act.

Petitioners in No. 76-585 at 17, 18 also argue that the regulations violate the Tenth Amendment by requiring the States to implement and enforce the PSD regulations. Neither the statute nor the regulations force the states to do anything to enforce the regulations. The states are given the opportunity to assume the responsibility for the implementation and enforcement of the regulations, but in no way are compelled to do so.¹⁹

D. AUTHORITY TO PROMULGATE THE PSD REGULATIONS IS NOT AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY

Petitioners in Nos. 76-585 at 12 and 76-603 at 11 argue that Congress has unconstitutionally delegated

¹⁹ Several Courts of Appeals have held that regulations that compel the States to take affirmative action to carry out the Clean Air Act are unconstitutional. *Brown v. EPA*, 521 F.2d *supra* at 838; *District of Columbia v. Train*, 521 F.2d 971 (C.A.D.C. 1975), certiorari granted — U.S. — (1976); *Maryland v. EPA*, 530 F.2d 215 (C.A. 4, 1975), certiorari granted, — U.S. — (1976). However, none of these decisions support the position that the PSD regulations violate the Tenth Amendment.

legislative authority to EPA by failing to set forth adequate criteria under which EPA prevent significant deterioration of existing clean air.

The delegation by Congress to EPA to prevent significant deterioration of existing clean air is not unconstitutional. Such delegation falls within the limits set by this Court in *Lichter v. United States*, 334 U.S. 742, 785 (1948):

It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. If Congress shall lay down by legislative act and intelligible principle * * * such legislative action is not a forbidden delegation of legislative power.

Petitioners cite *National Cable Television Association v. United States*, 415 U.S. 336, 342 (1974); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) as authority for their contentions. However, other decision by this Court have allowed Congress wide latitude in delegating its powers.²⁰

With regard to the Clean Air Act, the First Circuit Court of Appeals in *South Terminal Corp. v. EPA*, 504 F.2d 646, 676 (1974) pointed out that "The [Clean Air] Act leaves considerable flexibility to EPA in the

²⁰ Legislative criteria that have been described by this Court as adequate standards in delegating its powers are: the direction to do what is "necessary" to carry out the agency's functions, *United States v. Southwestern Cable Co.*, 392 U.S. 157, 180-181 (1968); and "just and reasonable" rates, *Permian Basin Rate Cases*, 390 U.S. 747 (1968).

choice of means. Yet there are benchmarks to guide the Agency and the courts in determining whether or not EPA is exceeding its powers * * *."

It appears that Congress has within the Clean Air Act set out a clear policy by which EPA must conform in promulgating the preventing of significant deterioration regulations.

CONCLUSION

For the foregoing reasons, respondent respectfully submit that Petitions for a Writ of Certiorari Nos. 76-529, 76-585, 76-594, and 76-603 should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

SIERRA CLUB, *et al.*, Plaintiffs,

v.

RUCKELSHAUS, *Defendant.*

CIVIL ACTION NUMBER 1031-72

Preliminary Injunction

(FILED MAY 30, 1972)

It appearing to the Court that a Preliminary Injunction pending hearing and determination of plaintiffs' request for a permanent injunction and other relief should be issued because, unless defendant is enjoined from approving portions of state implementation plans permitting significant deterioration of air quality, plaintiffs may suffer immediate and irreparable injury, loss and damage before the determination of this case on the merits,

NOW THEREFORE, IT IS ORDERED, that defendant, his agents, officers, servants, employees, and attorneys, and any persons in active concert or participation with him, be and they are, hereby enjoined until plaintiffs' request for a permanent injunction and other relief has been determined by this Court from, directly or indirectly, approving any state implementation plan under 42 U.S.C. 1857c-5 unless he approves the state plan subject to subsequent review by him to insure that it does not permit significant deterioration of existing air quality in any portion of any state where the existing air quality is better than one or more of the secondary standards promulgated by the Administrator. The Administrator shall complete this review of all the state plans within four months of this order. The Administrator, shall within this four-month period, approve any portion of a state plan which effectively prevents the significant deterioration of existing

air quality in any portion of any state, and disapprove any portion of a state plan which fails to effectively prevent the significant deterioration of existing air quality in any portion of any state.

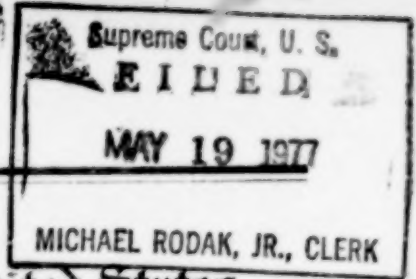
The Administrator shall prepare and publish proposed regulations, pursuant to 42 U.S.C. 1857c-5 (c) as to any state plan which he finds, on the basis of his review, either permits the significant deterioration of existing air quality in any portion of any state or fails to take the measures necessary to prevent such significant deterioration. Such regulations shall be promulgated within six months of this order.

This order shall be stayed until 9:00 a.m., May 31st, 1972.

/s/ ILLEGIBLE

District Judge

Date: 30 May 1972



IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-529

MONTANA POWER COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*,
Respondents.

No. 76-594

INDIANA-KENTUCKY ELECTRIC CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*,
Respondents.

**On Writs of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit**

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Petitioners in No. 76-594

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On Writs of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

This Court granted the petitions for writ of certiorari
in these cases and in Nos. 76-585, 76-603, 76-619, and

76-620, and consolidated the cases in an order entered on April 4, 1977 (A. 292a).

OPINION BELOW

The opinion of the Court of Appeals (A. 39a-90a) is reported at 540 F.2d 1114.

JURISDICTION

The judgment of the Court of Appeals (Pet. No. 76-529, at 91a-94a) was entered on August 2, 1976. The petitions for writ of certiorari were filed on October 15, 1976 (No. 76-529), October 27, 1976 (No. 76-585), October 29, 1976 (No. 76-594 and No. 76-603), and November 1, 1976 (No. 76-619 and No. 76-620). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Clean Air Act are set forth in Appendix A to this brief. The regulations being reviewed are set forth at A. 226a-242a, 252a-280a, 287a, and are published as 40 C.F.R. §§ 52.01(d) and (f), and 52.21.

QUESTIONS PRESENTED

As limited by and stated in this Court's order granting the petitions for writ of certiorari, the questions presented are:

1. Whether regulations promulgated by the Environmental Protection Agency to prevent the significant deterioration of air quality are authorized by the Clean Air Act?
2. Whether the Clean Air Act permits the Environmental Protection Agency to adopt regulations which

grant to Federal land managers and Indian governing bodies power to reclassify Federal and Indian lands within their jurisdiction?

STATEMENT OF THE CASE

This case involves the interpretation and application of the Clean Air Act, as amended, 42 U.S.C. §§ 1857 *et seq.* In compliance with a court order in earlier litigation interpreting that Act over his opposition to so require, the Administrator of the Environmental Protection Agency (hereinafter "EPA") has disapproved plans adopted by every State for the implementation of national primary and secondary ambient air quality standards; and EPA has amended or revised those plans by promulgating regulations which include therein provisions preventing "significant deterioration" of air which is cleaner than is required by the national primary and secondary standards. That interpretation of the Act and those actions by EPA were upheld by the court below. Among other things, those regulations confer upon Federal land managers and the governing bodies of Indian tribes authority, independent of State control and subject only to review by EPA, to reclassify Federal and Indian lands under their respective jurisdictions; and thus not only to restrict the construction of electric generating plants and other new sources of certain air pollutants upon those lands, but also upon lands owned by others up to 60 or more miles distant.

A. The Clean Air Act.

For the most part, the relevant provisions of the Clean Air Act were enacted by the Clean Air Act Amendments of 1970 (84 Stat. 1676), as summarized below. However, the "Findings and Purposes" section of the Act was first enacted in substantially its present form by the Clean Air Act of 1963 (77 Stat. 392). This includes the find-

ing that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments," which now appears unchanged in § 101(a)(3), 42 U.S.C. § 1857(a)(3). It also includes the statement of purpose "to protect the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population" which, as amended by the Air Quality Act of 1967 (81 Stat. 485) to add "and enhance the quality of" after "to protect," is now set forth in § 101(b)(1), 42 U.S.C. § 1857(b)(1). That statement of purpose is the only purported statutory basis for the significant deterioration regulations.

Under the 1970 Amendments, EPA designates each air pollutant which in its "judgment has an adverse effect on public health or welfare" (§ 108(a)(1), 42 U.S.C. § 1857c-3(a)(1)), and establishes national primary and secondary ambient air quality standards for each such air pollutant (§ 109(a), 42 U.S.C. § 1857c-4(a)). A primary standard is set at the level which EPA deems "requisite to protect the public health"—after "allowing an adequate margin of safety"—and a secondary standard is set at the level which EPA deems "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." § 109(b), 42 U.S.C. § 1857c-4(b).¹ Those standards "may be revised in the same manner as promulgated" (*ibid.*).

Each State has "the primary responsibility for assuring air quality within the entire geographic area com-

¹ "All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." § 302(h), 42 U.S.C. § 1857h(h).

prising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained . . . in such State." § 107(a), 42 U.S.C. § 1857c-2(a). Thus, "after reasonable notice and public hearings," each State adopts plans for "implementation, maintenance, and enforcement" of the primary and secondary standards and submits such plans to EPA for approval. § 110(a)(1), 42 U.S.C. § 1857c-5(a)(1). EPA "shall approve" such a plan so submitted if it satisfies eight criteria or requirements specified in § 110(a)(2) of the Act (42 U.S.C. § 1857c-5(a)(2)), and also "shall approve" any revision by a State thereof if such revision meets those specified "requirements" (§ 110(a)(3)(A), 42 U.S.C. § 1857c-5(a)(3)(A)). EPA is authorized by § 110(c)(1) to propose "regulations setting forth an implementation plan, or portion thereof, for a State" only if the plan (or portion thereof) submitted by the State "is determined by" EPA "not to be in accordance with" those eight "requirements" or criteria, and EPA can promulgate such regulations and thus make them a part of the State implementation plan only if the State in the meantime has not voluntarily adopted and submitted a "plan (or revision) which" EPA "determines to be in accordance with" those "requirements." 42 U.S.C. § 1857c-5(c)(1).²

It has neither been contended nor held in this litigation, or in the preceding litigation, that any of the eight requirements in § 110(a)(2) consists of or includes the prevention of significant deterioration of air which would continue to comply with the national primary and secondary standards. Rather, those requirements are directed toward compliance with the national standards,

² Those statutory provisions also authorize EPA to propose and promulgate a State implementation plan if the State fails to do so within the time allowed—a situation which is not involved here.

including (A) "attainment of such primary standard as expeditiously as practicable" and of "such secondary standard" within "a reasonable time;" (B) "emission limitations . . . and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard;" (E) "adequate provisions for intergovernmental cooperation . . . to insure that emissions of air pollutants . . . will not interfere with the attainment or maintenance of such primary or secondary standard . . . outside of such State or . . . other air quality control region;" and (H) "revision . . . of such plan . . . to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard" or "whenever" EPA "finds . . . that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements." 42 U.S.C. § 1857c-5(a)(2).³

In short, under the express terms of the 1970 Amendments, for "purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection [110](a) or promulgated under subsection [110](c) and which implements a national primary or secondary ambient air quality standard in a State." § 110(d), 42 U.S.C. § 1857c-5(d). And, only an "appli-

³ Requirement (C) relates to devices, methods, systems and procedures for monitoring, compiling and analyzing "data on ambient air quality;" requirement (D) relates to "a procedure" for preconstruction "review . . . of the location of new sources to which a standard of performance will apply" (see pp. 7-8, *infra*); requirement (F) relates to State personnel, funding and authority to carry out its implementation plan, monitoring requirements, reports, procedures for correlating reports with emission limitations or standards, and contingency plans; and requirement (G) relates to the enforcement of motor vehicle emission standards.

cable implementation plan" as thus defined is enforceable under § 113 of the Act. 42 U.S.C. § 1857c-8.⁴

The 1970 Amendments also added the provisions in § 111, including a requirement that EPA establish a "list of categories of stationary sources" which "may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare," and "Federal standards of performance for new sources within [each] such category." 42 U.S.C. § 1857c-6(b)(1). A "standard of performance" is defined to mean "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated." 42 U.S.C. § 1857c-6(a)(1).

Only the operation of a new source "in violation of any standard of performance applicable to such source" is made "unlawful" by § 111(e).⁵ 42 U.S.C. § 1857c-6(e). There is nothing in § 111 authorizing EPA to prevent construction or operation of a new source because it would cause deterioration of air quality which, nonetheless, would meet the national primary and secondary standards. Rather, one of the eight criteria for approval of an implementation plan under § 110(a) is that "it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of perform-

⁴ Section 113 also provides for enforcement of new source performance standards issued under § 111 of the Act, of emission limitations for hazardous pollutants established under § 112, and of inspection and monitoring requirements under § 114.

⁵ Thus, EPA may issue a compliance order or bring a civil action against "any person . . . in violation of section 111(e) (relating to new source performance standards), and any "person who knowingly . . . violates section 111(e)" is subject to criminal penalties. § 113, 42 U.S.C. § 1857c-8.

ance will apply." 42 U.S.C. § 1857c-5(a)(2)(D). The "paragraph (4)" referred to requires the procedure for pre-construction review of new sources to "provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the attainment or maintenance . . . of a national ambient air quality primary or secondary standard" § 110(a)(4), 42 U.S.C. § 1857c-5(a)(4).

Finally, § 116 of the Act, 42 U.S.C. § 1857d-1, expressly preserves the right of the States to include in implementation plans more "stringent" limitations upon air pollution than are required by the Act. And § 118, 42 U.S.C. § 1857f, requires Federal departments, agencies and instrumentalities to "comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements," except where exempted therefrom by the President in certain limited circumstances in which such an exemption is authorized by that section.⁶

B. The Significant Deterioration Regulations.

Shortly after enactment of the 1970 Amendments, EPA construed the Act to require approval of State implementation plans which complied with the eight requirements specified in § 110(a)(2), so that EPA in its own view did not have authority under the Act to disapprove such

⁶ The 1970 Amendments redesignated and substantially revised §§ 109 and 111 of the 1967 Act which became the present §§ 116 and 118. While not involved here, the 1970 Amendments also added the provisions relating to national emission standards for hazardous pollutants (§ 112, 42 U.S.C. § 1857c-7), as well as amending various provisions in Title II of the Act relating to emission standards for moving sources (§§ 201 *et seq.*, 42 U.S.C. §§ 1857f-1 *et seq.*).

plans for failure to include a significant deterioration provision or to promulgate regulations amending the plans to include such a provision. When the Administrator described this interpretation before Congressional committees,⁷ the Sierra Club and other groups filed a suit in the United States District Court for the District of Columbia contesting that interpretation. That court rejected EPA's interpretation of the Act, ordered EPA to disapprove plans insofar as they did not "effectively prevent significant deterioration of existing air quality," and directed EPA to propose remedial regulations amending the State plans. *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D. D.C., 1972). The District of Columbia Circuit affirmed *per curiam* on the basis of the opinion below, 4 ERC 1815 (1972), and this Court affirmed without opinion by an equally divided Court. *Fri v. Sierra Club*, 412 U.S. 541 (1973).⁸ Petitioners were not parties to that proceeding.

In response to that decision, EPA disapproved the implementation plans of every State insofar as they failed to provide for the prevention of significant deterioration (37 F.R. 23836); issued an initial notice of proposed rulemaking (38 F.R. 18985; A. 91a-159a); issued revised proposed regulations (39 F.R. 30999; A. 160a-205a); and, on December 5, 1974, published final signifi-

⁷ Hearings on Clean Air Act Oversight before the Subcommittee on Public Health and Environment of the House Committee on Interstate and Foreign Commerce, 92d Cong., 2d Sess., ser. 92-105 (1972), at 530-531; Hearings on Implementation of the Clean Air Act Amendments of 1970 before the Subcommittee on Air and Water Pollution of the Senate Public Works Committee, 92d Cong., 2d Sess., ser. 92-H31 (1972), Pt. 1, at 246-249, 271-276.

⁸ Thus, the only opinion in that case was that of District Judge Pratt. As was true of the court below in this case, he relied entirely upon the "protect and enhance" language in § 101(b)(1) as the statutory basis for the decision, and sought to support his decision by reference to legislative history of the 1970 Amendments. 344 F. Supp., at 255-256.

cant deterioration regulations (39 F.R. 42509; A. 206a-241a). In proposing such regulations, EPA stated that it did not regard the *Ruckelshaus* decision as "definitive" in view of this Court's equal division; and that EPA therefore "adheres to the view . . . that the Act does not require EPA or the States to prevent significant deterioration of air quality," and was acting only because of "the preliminary injunction issued by the District Court" (38 F.R., at 18986; A. 93a).

In proposing and promulgating these regulations, EPA was faced with the problem that the Act does not mention "significant deterioration" and the courts in the *Ruckelshaus* case had not determined "what constitutes significant deterioration and exactly how it will be prevented" (38 F.R., at 18986; A. 94a). So, too, the "protect and enhance" statutory language and the legislative history relied upon similarly provided no guidance, except insofar as they might imply that all degradation of air (and thus all economic growth) should be prevented—which no one contended to have been contemplated by the Congress (38 F.R., at 18987; A. 98a-99a). Furthermore, since the national ambient air standards are intended to prevent all "demonstrable or predictable adverse effects which can be quantitatively related to pollutant concentrations in the ambient air," EPA concluded that "significant deterioration must necessarily be defined without a direct quantitative relationship to specific adverse effects on public health and welfare" (38 F.R., at 18987; A. 97a-98a). Hence, any judgment of what deterioration would be significant "must be essentially subjective" (38 F.R., at 18988; A. 100a), based upon "consideration of varying social, economic, and environmental factors" (39 F.R., at 31001; A. 166a), and "[a]ny policy to prevent significant deterioration involves difficult questions regarding how the land in any area is to be used" (39 F.R., at 31001; A. 167a).

The regulations apply the significant deterioration provisions to two pollutants: particulate matter and sulfur dioxide. In view of the considerations outlined above (see 39 F.R., at 42510; A. 207a), EPA established a system for classifying the lands within each State. In Class I areas, "practically any" increase in the levels of those pollutants would be prohibited (and thus practically any economic growth); in Class II areas, somewhat larger increases in the levels of those pollutants would be allowed (but significantly less than would be allowed by the national standards) so that in EPA's judgment "moderate well-controlled growth" would be permissible; and in Class III areas, the level of those pollutants (and thus economic growth) could be increased up to the level allowed by the national standards (39 F.R., at 42510; A. 208a). However, since the regulations prohibit the construction of a new source which "would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State," a power plant located in a Class II area might violate Class I restrictions in areas as much as "60 or more miles away" so that the effect of a more restrictive classification "extends well beyond" its "boundaries into the adjacent areas" (39 F.R., at 42512; A. 219a).

The restrictions upon increments of the two pollutants are implemented by preconstruction review of construction of new or modified facilities which would constitute a "new source" of air pollution. Such construction would be prohibited if an applicable incremental limit would be violated, even if the best available technology would be used in compliance with § 111 of the Act. 40 C.F.R. § 52.21(d); A. 234a-237a, 255a, 287a.

The regulations initially place all areas in Class II. 40 C.F.R. § 52.21(c)(3)(i); A. 230a. "Redesignation" or reclassification of an area "may be proposed by the respective States, Federal Land Managers, or Indian

Governing Bodies," pursuant to procedures and considerations specified in the regulations, and are "subject to approval by" EPA. *Ibid.* A private landowner or manager, on the other hand, does not have a right under the regulations to propose a reclassification of his (or any other) land and, indeed, is not given a right to request his State to propose such a reclassification or to review by EPA (or anyone else) if the State refuses to do so.

The procedures and considerations applicable to proposed reclassifications are set forth in § 52.21(c)(3)(ii)-(v) of the regulations. A. 230a-232a, 253a-254a. Whether proposed by a State, Federal land manager or Indian governing body, a public hearing must be held and the proposed reclassification must be based on the record in that hearing and "must reflect . . . consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the area being proposed for redesignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interest." A State must consult with the leaders of local governments in the area covered and, if Federal lands are involved, with the Federal land manager (it cannot propose redesignation of an Indian Reservation over which it has not asserted jurisdiction under other laws). A Federal land manager can only propose "a more restrictive designation," and must consult with the State in which the Federal land is located (or on which it borders). An Indian governing body may propose reclassification of an Indian Reservation over which the State has not assumed jurisdiction under other laws, but must consult with the State in which the Reservation is located (or on which it borders) and, if held in trust, must obtain approval of the Department of the Interior.

In general, EPA "shall approve" a proposed reclassification within 90 days, unless it finds that the pro-

cedural requirements of the regulations have not been complied with or that the State, Federal land manager or Indian governing body "has arbitrarily and capriciously disregarded relevant considerations" specified by the regulations as quoted above. 40 C.F.R. § 52.21(c)(3)(vi); A. 232a-233a, 254a. But a proposal by a State cannot be approved unless the State also has requested and has been delegated by EPA the responsibility for carrying out preconstruction review of new sources (i.e., of administering both the new source performance standards and the incremental limits upon significant deterioration). *Ibid.* If a proposed reclassification (by whomever made) is protested by a State or Indian governing body, it can be approved only if EPA itself determines in its "judgment" that the reclassification "appropriately balances" the "considerations" specified in the regulations as quoted above. *Ibid.* Protests by others, such as private landowners who would be adversely affected by a proposed reclassification, do not give rise to such an independent "judgment" by EPA.

If a State, Federal land manager or Indian governing body proposes a reclassification, or even announces that it is considering doing so, pending applications for permission to construct new or modified facilities within the area cannot be approved until EPA has acted upon the proposed reclassification, thus subjecting such prior (as well as future) applications to the incremental limits applicable to the revised classification (if approved). 40 C.F.R. § 52.21(d)(5); A. 237a. EPA has construed this provision to apply also to applications relating to construction of facilities located outside the area proposed to be redesignated, if it could affect air quality within that area. See the September 28, 1976 Guidance Memorandum set forth as App. D to the Petition in No. 76-620.

C. The Proceedings Below.

Within 30 days after promulgation of the significant deterioration regulations, these and other petitioners filed petitions for review pursuant to § 307(b)(1) of the Act, 42 U.S.C. § 1857h-5(b)(1). A. 11a-38a. All those not filed in the District of Columbia Circuit were transferred to that Court and the cases were consolidated for briefing and argument. The Court of Appeals upheld the regulations. Its August 2, 1976 opinion was written by Judge Wright, who was joined by Judge Robinson. Judge Wilkey "concur[red] in the result only" without writing a separate opinion (A. 90a).

The Court of Appeals generally applied the "arbitrary and capricious" standard of the Administrative Procedure Act, which it deemed to require "that agency action be affirmed if a rational basis exists therefor" (A. 53a). But in regard to the "question whether the Clean Air Act should be interpreted to prohibit significant deterioration of air cleaner than the national standards," which "is necessarily the first level of analysis," the Court of Appeals "require[d] the clearest showing that *Sierra Club v. Ruckelshaus* was incorrectly decided, since Judge Pratt's decision was affirmed by both another panel of this court and an equally divided Supreme Court" (A. 54a, 55a). After reconsidering the *Ruckelshaus* decision under that standard of review, the Court of Appeals found "no substantial reason to question" its "continuing validity" (A. 67a; generally, at 54a-67a).

As noted above, the only statutory basis asserted for the holding that the Clean Air Act requires prevention of significant deterioration was the "protect and enhance" language in § 101(b)(1), setting forth one of the purposes of the Act (A. 55a-56a). The primary reliance of the court below, however, was placed upon certain legislative history of the 1970 Amendments (A. 56a-61a), which was thought to afford "every indication that Congress

intended in 1970 to continue a policy of prevention of significant deterioration of air quality" (A. 60a-61a). The Court of Appeals also thought that its interpretation was bolstered by "recent congressional statements" upon pending legislation (A. 61a-62a), and by the acceptance of the *Ruckelshaus* decision "in a number of other circuits" (A. 62a). It rejected contentions that the "shall approve" language in § 110(a)(2) of the Act, as interpreted and applied by decisions of this Court subsequent to *Ruckelshaus*, necessitated a contrary holding (A. 62a-66a).

In addition, the Court of Appeals rejected a number of contentions to the effect that the significant deteriorations are arbitrary and capricious or otherwise invalid, even assuming that the Clean Air Act requires prevention of significant deterioration (A. 67a-87a).⁹ But the Court of Appeals did not reach the merits of the only such contention before this Court for review under the limited grant of certiorari (i.e., the second question presented). Rather, with respect to the arguments as to the validity of the provisions authorizing Federal land managers and the governing bodies of Indian tribes to reclassify Federal and Indian lands, the court below held that "the issue is not yet ripe for review" (A. 86a). That holding was based upon the fact that "[n]o federal or Indian land has yet been redesignated," the possibility that EPA might "approve, as replacements for these regulations, individual state plans which did not include the powers granted to federal land managers and Indian governing bodies," and the conclusion "that reservation of power to federal land managers and Indian governing bodies should have no effect on present conduct," so that the court below did "not foresee any irreparable injury which

⁹ The Court of Appeals also rejected contentions that the Act, if interpreted to authorize the regulations, would be unconstitutional (A. 87a-89a).

may arise from deferral of this question until it arises in a more concrete context" (A. 86a-87a).

SUMMARY OF ARGUMENT

I. In compliance with an order entered over its opposition in the *Ruckelshaus* case, EPA has disapproved the implementation plans of every State and promulgated regulations amending those plans to prevent significant deterioration of air that nonetheless would satisfy the national primary and secondary ambient air quality standards established pursuant to the Clean Air Act. Those actions by EPA are contrary to the express requirement in § 110(a)(2) of the Act that EPA "shall approve" State implementation plans that meet eight specified criteria, and to the express limitation in § 110(c) upon EPA's authority to promulgate regulations amending such plans to circumstances in which an implementation plan "is not in accordance" with those criteria. The eight criteria are directed to the attainment and maintenance of the national primary and secondary standards, and no one has contended that any of them includes the prevention of significant deterioration of air where those standards will continue to be maintained.

Since its affirmance of the *Ruckelshaus* case by an evenly divided Court, this Court concluded in *Train v. Natural Resources Def. Council*, 421 U.S. 60 (1975), that the "shall approve" language in § 110(a)(2), as incorporated by § 110(a)(3) to apply to approval by EPA of proposed revisions by a State of its implementation plan, is mandatory in fact as well as in form; and the Court held that EPA therefore must approve proposed variances from such plans if the criteria set forth in § 110(a)(2) would continue to be satisfied, including variances that would permit cleaner air to deteriorate to the level of the national standards. Subsequently, in *Hancock v. Train*, 426 U.S. 167 (1976), and in *Union*

Electric Co. v. EPA, 427 U.S. 246 (1976), this Court reiterated its understanding that § 110 mandates approval by EPA of State implementation plans (or revisions thereof) that comply with the specified criteria, and applied that interpretation to other circumstances in the *Union Electric* case. Those decisions have resolved any doubts that may have existed at the time of the even division in the *Ruckelshaus* case, and should be sufficient in themselves to establish that the significant deterioration regulations are invalid.

This interpretation of § 110 also is supported by the contemporaneous interpretation of EPA, which initially concluded that the statute did not authorize it to disapprove State implementation plans, and to promulgate regulations amending those plans, for failure to prevent significant deterioration. It is that initial interpretation by EPA, rather than its subsequent actions compelled by the order in the *Ruckelshaus* case, that is entitled to weight in the courts. *Train v. National Resources Def. Council*, *supra* at 75, 87. In addition, the significant deterioration regulations are inconsistent with other provisions of the Act. Thus, only an "applicable implementation plan" is enforceable under § 113 of the Act, and an "applicable implementation plan" is defined in § 110(d) as one "which implements a national primary or secondary ambient air quality standard in a State." So, too, § 111(e) makes "unlawful" only the operation of a new source of pollution "in violation of any standard of performance applicable to such source" which has been established pursuant to § 111, while the regulations would prohibit construction or operation of a new source which would violate either such a new source performance standard or the incremental limits which EPA has established for purposes of defining what constitutes significant deterioration. See, also, §§ 110(a)(2)(D) and (a)(4) of the Act.

The only purported statutory basis for the regulations is the statement in § 101(b)(1) that one of the purposes of the Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." Such a general statement of purpose does not afford a basis for disregarding express requirements in the substantive provisions of the statute. That is particularly true in regard to a provision, such as § 110, which is both more specific and later enacted. Moreover, the statement in § 101(b)(1) does not include a purpose to prevent significant deterioration either in terms or by necessary implication.

But even if § 101(b)(1) had stated such a purpose, it would be compatible with our view that the "shall approve" language in § 110(a)(2) is actually as well as literally mandatory. Both that assumed purpose and the mandatory provisions of § 110 can and should be effectuated by recognizing that the prevention of significant deterioration has been left to the individual States pursuant to their authority under § 116 to establish more "stringent" standards than are required by the Act, and in accordance with the long-standing policy now expressed in § 101(a)(3) that "the prevention and control of air pollution at its source is the primary responsibility of the States and local governments;" and to the new source performance standards established pursuant to § 111 which require new or modified facilities to achieve "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction)" EPA "determines has been adequately demonstrated."

The Court of Appeals primarily relied upon a passage in the Senate Report on the 1970 Amendments to the Clean Air Act, which purportedly demonstrates acquies-

cence at that time by the Congress in an administrative interpretation of § 101(b)(1), as contained in a 1967 version of the Act, to include a policy of preventing significant deterioration. But there is no sound basis either for the purported administrative interpretation or the purported Congressional acquiescence, and the legislative history supports our interpretation of the Act.

The purpose clause in § 101(b)(1) was enacted by the Clean Air Act of 1963, except for the words "and enhance the quality of" which were added by the Air Quality Act of 1967. No litigant has claimed that there is legislative history of either the 1963 Act or the 1967 Act demonstrating that that clause was intended to include a policy of significant deterioration; rather, the legislative history of the 1963 Act shows that the Congress intended to protect air quality through the means provided in the substantive provisions of the Act, and the legislative history of the 1967 Act similarly shows that the Congress intended to enhance air quality in like manner. The purported administrative interpretation of the 1967 Act related to the standards to be established for air quality control regions under that Act, rather than to the deterioration of air that would continue to maintain or exceed those standards, and such control regions were established only in areas where the air already was so polluted as to endanger the public health or welfare.

The single passage in the Senate Report on the 1970 Amendments, upon which the court below so heavily relied, is the only bit of legislative history through the enactment of those Amendments which anyone has contended in this litigation to demonstrate a recognition by any member of the Congress that the § 101(b)(1) purpose clause includes a policy of preventing significant deterioration. Yet, that passage does not refer to the purpose clause or to the purported administrative in-

terpretation thereof and, while ambiguous, in context appears to refer only to the maintenance of air quality at levels which will comply with the national primary and secondary standards. On the other hand, not only the Senate Report but also the House and Conference Reports on the 1970 Amendments, affirmatively demonstrate that the Congress did in fact intend the "shall approve" language in § 110(a)(2) to be mandatory, and that the imposition of any requirements more stringent than is necessary to comply with the national primary and secondary standards was in fact intended to be left to the States under § 116 and to the establishment of new source performance standards pursuant to § 111. Hence, that single passage in the Senate Report cannot possibly justify the significant deterioration regulations, and there is no other basis for those regulations.

II. The significant deterioration regulations establish a classification system under which the increments of particulate matter and sulfur dioxide that would be allowed basically are related to the degree of economic growth or development deemed to be desirable. In general, only the States may propose reclassification of areas within their respective boundaries, in accordance with considerations specified in the regulations and subject to approval by EPA, but Federal land managers are given authority to propose a more restrictive classification for Federal land under their respective jurisdictions, and only the governing body of an Indian tribe may propose reclassification of tribal land if the State in which it is located has not asserted jurisdiction over such land under other laws. Such a reclassification may affect the construction of new sources not only on the Federal and Indian lands involved, but also on adjacent lands for a distance of up to 60 to 100 miles if by reason of wind drift they could contribute to the increment of the pollutants in the air over the Federal or Indian land.

Even if the Court holds, contrary to our view, that EPA did have authority under the Clean Air Act to promulgate the significant deterioration regulations in general, those provisions for reclassifying Federal and Indian lands violate the Clean Air Act. Section 107(a) delegates to each State "the primary responsibility for assuring air quality within the entire geographic area comprising such State," and no exception is made—either in § 107 or elsewhere in the Act—for Federal or Indian lands. Yet, a State cannot even propose reclassification of Indian lands, a reclassification proposal by a Federal land manager (if approved by EPA) overrides a proposal by a State in regard to Federal land, and a more restrictive reclassification of either Federal or Indian land in effect determines also the permissible utilization of adjoining State and private lands over wide areas. The extent and distribution of Federal and Indian lands in some western States is such that the use of most, if not all, other lands in the State could be affected by reclassifications of the Federal and Indian lands. Moreover, although the regulations amend State implementation plans and were promulgated by EPA in its role as a surrogate for the States, they arbitrarily discriminate against a State's municipal and private landowners and managers who are given no right to propose a reclassification of their lands.

While EPA suggested in promulgating the regulations that the reclassification authority given to Federal land managers is "consistent" with § 118 of the Act, EPA did not even contend that such authority is conferred by § 118 and in fact it is contrary to that statutory provision. Under § 118, Federal agencies "shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." (Emphasis added.) The authority given to Federal land managers is not merely declaratory of the proprietary

right of the Federal Government to impose more restrictive requirements on the use of its lands, as EPA also suggested, since reclassification also affects the use of adjoining State and private lands. And, that authority is not necessary to protect air quality over national forests and parks, despite a suggestion by EPA to the contrary, as the primary responsibility of a State in that regard "within the entire geographic area comprising such State" includes national parks and forests located within the State. Moreover, reclassifications are based upon considerations unrelated to air quality and going primarily to economic growth and development.

EPA's explanation of the reclassification authority given to Indian governing bodies, as being "consistent with the independent status of Indian lands not subject to State laws," shows that it has misconceived the relationship among Indian tribes, the States and the Federal Government. State implementation plans do not constitute some independent exercise of State law, but rather are authorized and required by the Clean Air Act so as to fulfill the State's duty under § 107(a) to assure air quality within its "entire geographic area." Such a general Act of Congress applies to Indians and their lands, "in the absence of a clear expression to the contrary" *F.P.C. v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960). The Clean Air Act does not contain any "expression to the contrary," but rather expressly provides that the authority delegated to a State thereunder is to apply throughout the entire geographic area of the State.

Although the Court of Appeals did not decide the merits of these issues regarding the validity of the reclassification provisions, holding that they were not ripe for judicial review, this Court's limited grant of certiorari did not expressly include the ripeness issue. Thus, the Court may have concluded already that the issues going

to the merits are ripe for review, but if not it should do so. The mere existence of the reclassification authority given to Federal land managers and Indian governing bodies affects the present conduct of petitioners and others, since they cannot base their future planning upon the existing classification of land. A proposal or, indeed, the mere announcement that consideration is being given to a proposal for reclassification by a Federal land manager or Indian governing body results in the suspension by EPA of the processing of pending applications for permits to construct new sources on adjacent lands, and the incremental limits under the revised classification (if approved) will be applied to such pending permit applications. Thus, EPA has refused to approve a permit application by certain of these petitioners, even though the electric generating units involved would comply with existing Class II limits, because of a proposal by an Indian tribe to reclassify its adjacent lands in Class I.

Moreover, under § 307(b)(1) of the Clean Air Act, petitions attacking the validity of the regulations promulgated by EPA must be filed within 30 days after the promulgation, as in fact was done, if not "based solely on grounds arising after such 30th day." The issues concerning the validity of the reclassification provisions are purely issues of law which arose when the regulations were promulgated. Even if the ripeness of those issues for judicial review otherwise was doubtful, this special jurisdictional provision would warrant the Court in reviewing the issues on the merits, *Buckley v. Valeo*, 424 U.S. 1, 117 (1976), particularly since those issues could not be raised later and will be insulated from any judicial review if not reviewed now.

ARGUMENT

I. The Significant Deterioration Regulations Violate the Clean Air Act.

Section 110(a)(2) of the Act expressly provides that EPA "shall approve" State implementation plans that satisfy eight specified requirements, none of which includes prevention of significant deterioration. In three recent cases, this Court has construed that "shall approve" language to be mandatory in fact as well as in form. Prior to the *Ruckelshaus* case, EPA construed that language to deprive it of authority to disapprove State plans for failure to prevent significant deterioration. The significant deterioration regulations also are inconsistent with other provisions of the Act, and they are not supported by the statement of purpose in § 101(b)(1) or by the legislative history upon which the court below relied. For these and other reasons discussed more fully below, the significant deterioration regulations are invalid and should be set aside by this Court.

1. *EPA's disapproval of the State implementation plans and its amendment of those plans to include the significant deterioration regulations are contrary to mandatory language in § 110 of the Act.* Section 110(a)(2) expressly provides that EPA "shall approve" a State implementation plan which satisfies eight requirements or criteria set forth therein. Section 110(a)(3) expressly provides that EPA "shall approve" any revision of a State plan which satisfies those eight requirements. And, § 110(c)(1) authorizes EPA to propose and promulgate regulations amending a State implementation plan only if the plan is not "in accordance with the requirements" set forth in § 110(a)(2). See pp. 4-5, *supra*. That statutory language is plain, unambiguous and mandatory in nature. No exception is made in § 110 or elsewhere in

the Act which, indeed, does not mention significant deterioration.

It has neither been contended nor held in this litigation, or in the prior *Ruckelshaus* litigation, that any of those eight requirements consists of or includes prevention of significant deterioration of the quality of air that would remain as clean as or cleaner than the quality required by the national primary and secondary air quality standards. To the contrary, those requirements are directed towards the "attainment" and "maintenance" of the national standards. See pp. 5-6, *supra*. Consequently, there can be no doubt that the actions of EPA in disapproving all State implementation plans and promulgating the significant deterioration regulations as amendments thereto, which actions were taken pursuant to the order entered in the *Ruckelshaus* case over EPA's opposition, conflict with the express provisions of § 110 of the Act.

2. *The decision below is contrary to decisions of this Court construing § 110 to be mandatory in fact as well as in form.* The affirmance of the *Ruckelshaus* decision by an evenly divided Court is, under well established principles, without precedential effect. See, e.g., *Neil v. Biggers*, 409 U.S. 188, 190-192 (1972). Whatever the reasons for affirmance may have been at the time, the entire Court, after further consideration of the Clean Air Act in three subsequent cases, has construed that Act in a manner inconsistent with the *Ruckelshaus* decision and with the decision below in this case. The Court has construed the "shall approve" language in § 110 to be actually as well as literally mandatory, so that EPA *must* approve a State implementation plan, or revision thereof, that satisfies the eight requirements prescribed in § 110(a)(2).

In *Train v. Natural Resources Def. Council*, 421 U.S. 60 (1975), the issue was whether § 110(a)(3) requires

EPA to approve certain variances from emission limitations specified in State implementation plans as "revisions" of such plans. Such variances would permit more air pollution than an implementation plan otherwise would permit, but the plan as so revised nonetheless would attain and maintain the national ambient air quality standards and otherwise comply with the eight requirements specified in § 110(a)(2). In holding that "the revision mechanism of § 110(a)(3) is available for the approval of those variances which do not compromise the basic statutory mandate that . . . the national primary ambient air standards be attained . . . and maintained thereafter" (*id.*, at 99), this Court pointed out that under § 110(a)(3) "Agency approval is subject only to the condition that the revised plan satisfy the general requirements applicable to original implementation plans" (*id.*, at 80), and that (*id.*, at 79):

"Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 110(c)." (Emphasis by the Court.)

The only dissenter (without opinion) was Mr. Justice Douglas, and only Mr. Justice Powell did not participate in the decision (*id.*, at 99).

The Court's conclusion in *Train* that the Act requires EPA to approve State implementation plans and revisions which provide "for the timely attainment and subsequent maintenance of [the national primary and sec-

ondary] ambient air standards" has been reaffirmed in two subsequent decisions: *Hancock v. Train*, 426 U.S. 167 (1976), and *Union Electric Co. v. EPA*, 427 U.S. 246 (1976).

In the course of holding (over the dissent of Justices Stewart and Rehnquist) in *Hancock* that § 118 of the Act does not require Federal installations to abide by the permit requirement of State implementation plans, this Court observed that EPA is "required to approve each State's implementation plan as long as it was adopted after public hearings and satisfied the conditions specified in § 110(a)(2)." 426 U.S., at 169-170.¹⁰ And, while holding in *Union Electric Co.* that courts may not review and overturn EPA's approval of a State implementation plan on the basis of "claims of economic and technological infeasibility" since EPA itself cannot "consider such claims in approving or rejecting a state implementation plan" (427 U.S., at 256; generally, at 256-266), this Court pointed out (427 U.S., at 257) that § 110(a)(2):

" . . . sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator 'shall approve' the proposed state plan. *The mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified, Train v. NRDC, supra*, at 71 n. 11, 79, and none of the

¹⁰ See, also, *id.*, at 170. So, too, this Court contrasted the use of the "permissive" word "may" in relevant provisions of §§ 111, 112 and 114 with the use of the mandatory word "shall" in § 110(a) under which a State "must promulgate an implementation plan," to support its holding in *Hancock* that Federal facilities are not subject to State permit requirements. *Id.*, at 192, 194-195. See, also, *Natural Resources Defense Council, Inc. v. Train*, 545 F.2d 320, 324-325 (2d Cir., 1976), which holds that the requirement in § 108(a)(1) of the Act that EPA "shall . . . publish" a list including each pollutant that has an adverse effect on public health or welfare is "mandatory."

eight factors appears to permit consideration of technological or economic infeasibility. Nonetheless, *if a basis is to be found for allowing the Administrator to consider such claims, it must be among the eight criteria*, and so it is here that the argument is focused." (Emphasis added.)

All members of the Court joined in that opinion. And, we repeat, no one in this litigation has contended and the court below did not hold that there is a "basis" for requiring State plans to prevent significant deterioration "among the eight criteria" specified in § 110(a)(2).

The court below rejected this Court's interpretation of § 110(a)(2) as mandating approval by EPA of State implementation plans that satisfy the eight requirements specified therein, regardless of other considerations, on the ground that the *Train* and *Union Electric* cases "did not consider the issue of nondeterioration" or "the significant deterioration of air cleaner than the national standards" (A. 64a, 65a), and that the pertinent statement in *Hancock* was "dictum" (A. 63a, n. 39). As a matter of fact, however, *Train* was not concerned only "with air pollution below [i.e., dirtier than] national standards" (A. 64a), but also involved variances which would permit cleaner air to deteriorate to the level of the national standards.¹¹ In any event, this Court's reiteration in *Hancock* and *Union Electric* of the conclusion in *Train* that the "shall approve" language is mandatory, and the application of that interpretation in *Union Electric* to a completely different factual situation, demonstrates

¹¹ This Court expressly noted that treating variances as revisions under § 110(a)(3) "would result in variances being readily approved in two situations: first, where the variance does not defer compliance beyond the attainment date; and second, where the national standards have been attained and the variance is not so great that a plan incorporating it could not insure their continued maintenance." 421 U.S., at 77. The second situation is the one in which deterioration of cleaner air to the level of the national standards would be permitted by approval of a variance.

its general application to situations in which EPA's approval of (or disapproval and promulgation of amendments to) State implementation plans is involved. The Court did not make any exception for plans that fail to provide for the prevention of significant deterioration, or even reserve that situation,¹² and no exception is made in § 110 itself.

3. *The decision below is contrary to EPA's contemporaneous interpretation of § 110.* EPA initially construed the 1970 Amendments to require its approval of State implementation plans which complied with the eight criteria specified in § 110(a)(2), and thus concluded that such plans could not be disapproved or amended for failure to include provisions for the prevention of significant deterioration. See pp. 8-9, *supra*. That interpretation was asserted and defended by EPA, the Department of Justice and the Office of the Solicitor General throughout the *Ruckelshaus* litigation. See p. 9, *supra*. And, in proposing the significant deterioration regulations pursuant to an injunctive order in *Ruckelshaus*, EPA made clear that it "adheres to the view . . . that the Act does not require EPA or the States to prevent significant deterioration of air quality." See p. 10, *supra*.

A similar situation was involved in the *Train* case when decided by this Court. EPA's initial "interpretation of § 110(a)(3), which provides that the Agency shall approve any revision of an implementation plan which meets the § 110(a)(2) requirements applicable to an original plan," was that "§ 110(a)(3) permits a State

¹² This Court hardly could have been unaware of the significant deterioration issue, as the opinion of the Fifth Circuit before the Court in *Train* and the opinion of the Eighth Circuit before the Court in *Union Electric* are among those that uncritically accepted *Ruckelshaus* as establishing a requirement for the prevention of significant deterioration. See 489 F.2d 390, 408 (5th Cir., 1974), and 515 F.2d 206, 220 (8th Cir., 1975). And see n. 29, p. 56, *infra*.

to grant individual variances from generally applicable emission standards . . . so long as the variance does not cause the plan to fail to comply with the requirements of § 110(a)(2)." 421 U.S., at 70. But after four courts of appeals had rejected that interpretation, EPA "modified its guidelines to comply with the then-unanimous rulings that after the attainment date the postponement provision was the only basis for obtaining a variance." 421 U.S., at 74.

This Court concluded in *Train* that, even if EPA's original "construction of the Act was [not] the only one it permissibly could have adopted," it "was at the very least sufficiently reasonable that it should have been accepted by the reviewing courts." 421 U.S., at 75. Since "the Agency's interpretation of §§ 110(a)(3) and 110(f) was 'correct' to the extent that it can be said with complete assurance that any particular interpretation of a complex statute such as this is the 'correct' one," and in view of the "facts that the Agency is charged with administration of the Act, and that there undoubtedly has been reliance upon its interpretation by the States and other parties affected by the Act, we have no doubt whatever that its construction was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency. *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965); *McLaren v. Fleischer*, 256 U.S. 477, 480-481 (1921)." 421 U.S., at 87.

We submit that EPA's initial interpretation of § 110(a)(2) involved in this case also "was at the very least sufficiently reasonable that it should have been accepted by the reviewing courts." That interpretation, like EPA's interpretation involved in *Train*, was based upon the mandatory "shall approve" language which is equally applicable to approval of State implementation plans under § 110(a)(2) and to approval of revisions of such plans under § 110(a)(3). In both situations, the identi-

cal requirements must be satisfied in order for the "shall approve" language to apply, and those requirements do not include prevention of significant deterioration, just as they do not include prevention of variances, so long as the State implementation plan does not fail to provide for attainment and maintenance of the national primary and secondary standards. In short, EPA's contemporaneous interpretation of § 110 provides additional support for the position which we advocate in this case, just as that Agency's similar interpretation of § 110(a)(3) provided support for this Court's decision in *Train*, in accordance with general principles enunciated and applied by this Court in many cases including those cited in *Train* as quoted above.

4. *The significant deterioration regulations also are inconsistent with other provisions of the Act.* We have emphasized the mandatory "shall approve" language in § 110(a)(2) of the Act. That is the statutory provision which expressly and directly applies to EPA's approval or disapproval of State implementation plans, and to its promulgation of regulations amending such plans insofar as they have been disapproved. It should not be overlooked, however, that the significant deterioration regulations also are inconsistent with other provisions of the Act.

Most important in this regard is the fact that EPA has sought to enforce those regulations by prohibiting the construction or operation of a new source of air pollution if a violation of the significant deterioration increments would result, even though the new source would use the best available system of emission reduction in compliance with the Federal standards of performance for new sources established pursuant to § 111 of the Act. See p. 11, *supra*.

That enforcement provision is not consistent with § 111(e), under which only the operation of a new source

"in violation of any standard of performance applicable to such source" is made "unlawful," and subjected to enforcement under § 113. See p. 7, *supra*. Neither is it consistent with the § 110(d) definition of an "applicable implementation plan" as one which "has been approved under subsection [110](a) or promulgated under subsection [110](c) and which implements a national primary or secondary ambient air quality standard in a State" (emphasis added). The only implementation plans enforceable under § 113 are such "applicable implementation plan[s]." See pp. 6-7, *supra*. Those inconsistencies are tied together, and to the inconsistency of the significant deterioration regulations with the requirements in § 110 for approval of a State plan or revision thereof, by the fact that, under §§ 110(a)(2)(D) and (a)(4), one such requirement is that the implementation plan "provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the attainment or maintenance . . . of a national ambient air quality primary or secondary standard" (emphasis added). See pp. 7-8, *supra*.

In sum, the enforcement provisions of the Act are limited to enforcement of the new source performance standards established under § 111 and of "applicable implementation plans" which "implement a national primary or secondary ambient air quality standard," including preconstruction review aimed at preventing the construction or modification of a new source at a location where such construction or modification would "prevent the attainment or maintenance" of those national standards. As so written and construed, the substantive provisions of the Act in regard to both State implementation plans and new source performance standards, and the enforcement provisions of the Act, make a harmonious

whole. On the other hand, by providing that preconstruction review of new (including modified) sources shall also encompass compliance with the requirements of the significant deterioration regulations, those regulations are as inconsistent with §§ 111 and 113 of the Act as they are with § 110.

5. *Approval of State implementation plans which do not prevent significant deterioration is not inconsistent with the purposes of the Act.* The only purported statutory basis for the holdings by the lower courts, both in this case and in the prior *Ruckelshaus* case, is the statement in § 101(b)(1) that one of the purposes of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population" See pp. 9 n. 8, and 14, *supra*. Even if that statement of purpose included a general purpose that EPA prevent significant deterioration of air that will continue to comply with the national primary and secondary standards, it could hardly override the express substantive requirement in § 110 that EPA "shall approve" a State implementation plan that satisfies the criteria set forth in § 110(a)(2)—none of which includes the prevention of significant deterioration.¹³ That is particularly true since § 110 is the more specific statutory provision. One of the accepted canons of statutory con-

¹³ In *Connecticut Co. v. Power Comm'n*, 324 U.S. 515, 527 (1945), for example, this Court held that language of general purpose in the Federal Power Act favoring State, as opposed to Federal, regulation "cannot nullify a clear and specific grant of jurisdiction" to the Federal Power Commission contained in the substantive provisions of the Act "even if the particular grant seems inconsistent with the broadly expressed purpose." As this Court pithily stated in *Train v. City of New York*, 420 U.S. 35, 45 (1975), "legislative intention, without more, is not legislation."

struction is that, where statutory provisions conflict with each other, the more specific provision prevails.¹⁴

But however that may be, there is nothing in the literal language of that purpose clause which necessarily encompasses, even in general terms, the significant deterioration regulations promulgated by EPA. Certainly, those regulations cannot be based upon the "protect and enhance" language alone, as such an interpretation would not permit any deterioration of existing air quality—which no one even suggests was intended by the Congress—while the regulations permit some deterioration even in Class I areas. Moreover, the stated purpose is to protect and enhance the "quality of the Nation's air resources" (emphasis added), not of each and every location in the Nation. Implementation of the national secondary and primary standards, the new source performance standards and other substantive provisions of the Act (such as the standards of emissions for moving vehicles) obviously will "protect and enhance the quality of the Nation's air resources" on an overall national basis.

Furthermore, the stated purpose is to protect and enhance the quality of the Nation's air resources "so as to promote the public health and welfare and the productive capacity of its population." Promotion of the "public health" as that term is used in the Act is assured by implementation of the national primary standards which are set at levels EPA deems "requisite to protect the public health" after "allowing an adequate

¹⁴ This is true even if the more specific provision is enacted prior to the general provision. *E.g.*, *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974); *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). And, of course, since § 110 was enacted in 1970, after the enactment of § 101(b)(1) in 1963 and its amendment in 1967, any otherwise "irreconcilable" conflict should be resolved in favor of § 110, even if those provisions were equally specific. *E.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *United States v. Borden Co.*, 308 U.S. 188, 198-199 (1939).

margin of safety;" and promotion of the "public welfare" as that term is used in the Act is assured by implementation of the national secondary standards which are set at levels EPA deems "requisite to protect the public welfare from any known or anticipated adverse affects associated with the presence of such air pollutant in the ambient air." See p. 4, *supra*. Since the purpose clause uses the very terms—"public health" and "public welfare"—explicated in the national primary and secondary standards, the purpose stated in § 101(b)(1)—protection and enhancement of the quality of the Nation's air resources—clearly is served by implementing the national primary and secondary standards. And, the "productive capacity of [the Nation's] population" would be hindered, rather than "promot[ed]," by the significant deterioration regulations insofar as they prevent construction or modification of productive facilities that satisfy the national primary and secondary standards.

Indeed, the purpose clause in question could be given effect, without overriding the "shall approve" language in § 110, even if § 101(b)(1) stated that a purpose of the Act is to prevent the significant deterioration of air which exceeds the quality required by the national primary and secondary standards. From its beginning in 1955, the Clean Air Act has included the policy, now stated in § 101(a)(3), that "the prevention and control of air pollution at its source is the primary responsibility of the States and local governments."¹⁵

¹⁵ The 1955 Act, which primarily provided for Federal research and assistance to the States, included a statement of "the policy of the Congress to preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution" (69 Stat. 322). That statement was enacted in its present form by the Clean Air Act of 1963, which first enacted the Findings and Purposes section (77 Stat. 392-393) now set forth in substantially identical language in § 101 of the Act.

While the subsequent history of the Act has been one of gradually expanding Federal participation in the abatement of air pollution and the 1970 Amendments "sharply increased federal authority and responsibility in the continuing effort to combat air pollution," "[n]onetheless, the Amendments explicitly preserved the principle: 'Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State'" *Train v. Natural Resources Def. Council*, *supra* at 64. See, generally, *id.*, at 63-65, and pp. 53-54, *infra*. Thus, § 116 of the Act expressly preserves the right of the States to impose more "stringent" standards and limitations than those required by the Act.

If § 101(b)(1) did include a policy to prevent significant deterioration, therefore, the obvious conclusion is that the policy is for the States to implement as they see fit pursuant to § 116, rather than that the mandatory "shall approve" language in § 110 should be disregarded so as to create a Federal role in the implementation of that policy which has not been provided for in the substantive provisions of the Act. That is emphasized by the fact that § 101(b)(1) was enacted (except for the "and enhance" language) by the Clean Air Act of 1963 which merely "authorized federal authorities to expand their research efforts, to make grants to state air pollution control agencies, and also to intervene directly to abate interstate pollution in limited circumstances." *Train v. Natural Resources Def. Council*, *supra* at 63-64 (emphasis by the Court). So, too, under the Air Quality Act of 1967, which amended § 101(b)(1) to add the "and enhance" language so as to enact it in its present form, "the States generally retained wide latitude to determine both the air quality standards which they would meet and the period of time in which they would do so." *Id.*, at 64. See pp. 40-44, *infra*.

It was not until the 1970 Amendments that the Congress, because of the "little progress" made by the States, "reacted by taking a stick to the States" so that for "the first time they were required to attain air quality of specified standards, and to do so within a specified period of time." *Id.*, at 64-65. But that "stick" consisted of the substantive provisions set forth in §§ 107-112 of the Act, including the provision in § 110 that EPA "shall approve" State implementation plans, and revisions thereof, that meet the requirements set forth in § 110(a)(2), and that authorizes EPA to promulgate regulations amending such plans only insofar as they fail to satisfy those requirements.

We submit, therefore, that even if § 101(b)(1) did include a purpose to prevent significant deterioration of air that would continue to comply with the national standards, the reasonable conclusion is that implementation of that purpose is one of the matters that the Congress has left to the "primary responsibility of States and local governments" pursuant to the long-standing policy stated in § 101(a)(3). By thus giving effect to that policy and to the "shall approve" language in § 110, as well as to the purpose expressed in § 101(b)(1) (assuming that it includes prevention of significant deterioration), such an interpretation would accord with the fundamental rule of statutory construction that, if possible, the various provisions of a statute are to be construed so as to give effect to each rather than overriding or disregarding the language of one such provision.¹⁶

Finally, even if § 101(b)(1) is read to imply both a purpose to prevent significant deterioration and a Federal role in such prevention, that still would not justify disregarding the express and unambiguous language of

¹⁶ See, e.g., *FAA Administrator v. Robertson*, 422 U.S. 255, 261 (1975); *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973).

§ 110. As EPA observed in proposing the significant deterioration regulations, pursuant to the injunction in the *Ruckelshaus* case, nothing in § 101(b)(1) or the legislative history relied upon by the courts defines significant deterioration or suggests specific or particular measures for its prevention. See page 10, *supra*. Any such general undefined policy of preventing significant deterioration can be accommodated by the new source performance standards required to be established under § 111, mandating use of the best available system of reducing emissions that is economically feasible. Section 111 does—and was intended to—afford a Federal means of protecting the quality of air that is cleaner than is required by the national primary and secondary standards. *Natural Asphalt Pavement Ass'n v. Train*, — U.S. App. D.C. —, 539 F.2d 775, 783 (1976). See p. 54, *infra*. Certainly, there is no basis in § 101(b)(1), or in the legislative history, or in reason for concluding that even more stringent limitations can be demanded by EPA of every State.

To summarize, the language of § 101(b)(1) cannot reasonably be construed as expressing a purpose to prevent significant deterioration of air that would remain as clean as or cleaner than is required by the national primary and secondary standards. But even if § 101(b)(1) does express such a purpose, it would not afford a basis for overriding the express provisions of § 110, which were enacted later and are more specific than § 101(b)(1). Both that assumed purpose and the provisions of § 110 can and should be effectuated, by recognizing that the prevention of significant deterioration has been left to the States under § 116 and to the new source performance standards established pursuant to § 111, rather than to EPA under § 110.

6. *The significant deterioration regulations are not supported by legislative history.* In view of the plain lan-

guage of § 110 and decisions of this Court interpreting that language to mean what it says, as well as the other circumstances discussed above, there is little if any need to resort to the legislative history of the Clean Air Act. But since the court below primarily relied upon certain legislative history of the 1970 Amendments, which was thought to afford “every indication that the Congress intended in 1970 to continue a policy of prevention of significant deterioration of air quality” (see pp. 14-15, *supra*), we have concluded that we should address the legislative history in depth despite the risk of overemphasizing its importance. When that is done, it becomes apparent that the material relied upon does not support the conclusion of the court below and that, to the contrary, the legislative history affirmatively demonstrates that the Congress intended the “shall approve” language in § 110 to be mandatory in fact as well as in form.”

¹⁷ The court below also relied to some extent upon “recent congressional statements” made last year in connection with proposed amendments to the Clean Air Act which the Congress considered, but did not enact. The proposed amendments included lengthy provisions that would expressly and specifically limit the deterioration of air cleaner than the national standards require. While the committee reports and statements during the debates by proponents of the legislation do contain assertions to the effect that the “protect and enhance” purpose clause in § 101(b)(1) of the Act (as enacted by the 1967 Act) incorporates a “policy” of preventing significant deterioration, which was not altered by the 1970 Amendments, opponents were equally clear that no such “policy” had ever been intended by the Congress. Moreover, even those who supported the view that such a “policy” was included within the general purpose expressed by § 101(b)(1) conceded that the Congress had not spelled out what would constitute significant deterioration or the process by which it would be prevented. The pertinent statements in these regards are collected in the Petition in No. 76-529, at 20-24. In view of the conflicting nature of those statements, we see no need to discuss them further as they exemplify the reasons why “the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.” *United States v. Price*, 361 U.S. 304, 313 (1960). However, a comparison of the extensive consideration which the Congress devoted to the significant deterioration issue when

The starting point must be the Clean Air Act of 1963 because it first enacted (as § 1) the Findings and Purposes section now designated as § 101,¹⁸ including the purpose "to protect the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population" (77 Stat. 393). Since that purpose clause (as amended in 1967 to add "and enhance the quality of" after "to protect") is the sole asserted statutory basis for the significant deterioration regulations, and since any requirement for the prevention of significant deterioration at most involves protection rather than enhancement of air quality, it would seem that if such a requirement exists it must have originated with the 1963 Act.

No one has contended, however, either in this litigation or in the prior *Ruckelshaus* litigation, that there is any legislative history of the 1963 Act which demonstrates a Congressional intent or policy to prevent significant deterioration, and we have found none. Rather, the legislative history demonstrates that the Congress had no such intent. As this Court said in the *Train* case, the 1963 Act was enacted to authorize "federal authorities to expand their research efforts, to make grants to state air pollution control agencies, and also to intervene directly to abate *interstate* pollution in limited circumstances." See p. 36, *supra*. Thus, in its discussion of the "Findings and Purpose" section of the legislation, S. Rept. No. 638, 88th Cong., 1st Sess. (1963), states at pp. 5-6, among other things, that:

truly before it, with the complete absence of any such consideration up to and through enactment of the 1970 Amendments, affords a convincing demonstration that the pertinent legislative history is contrary to the decision below.

¹⁸ Section 1 of the 1963 Act was renumbered as § 101 by a 1965 amendment (79 Stat. 992) which did not change the language of the section.

"Section 1. This section of the proposed revision of existing law is an expansion and clarification of the provisions of section 1 of existing law and there are several portions of this section which merit particular attention.

* * * *

"Financial and technical assistance would be made available to State and local governments for the development and execution of their air pollution prevention and control program. *This legislation recognizes the importance of protecting our air resources and accordingly provides not only for research and developmental programs, but also provides for procedures to be followed in enforcing air pollution abatement.*" (Emphasis added.)

See, also, H. Rept. No. 508, 88th Cong., 1st Sess. (1963), at 4, 6.

Hence, it was because the Congress "recognize[d] the importance of protecting our air resources" that it "accordingly" provided for the research and development programs and the abatement procedures contained in the substantive provisions of the 1963 Act. There is no suggestion that the purpose "to protect" the Nation's air resources was intended also to confer upon the Federal Government authority to establish other programs or abatement procedures deemed to be necessary or desirable for that purpose.¹⁹

¹⁹ The abatement procedures of the 1963 Act were contained in § 5 (77 Stat. 396-398) which made the "pollution of air in any State or States which endangers the health or welfare of any persons . . . subject to abatement as provided in this section." They consisted essentially of suits by the Attorney General for the "abatement" of "pollution of air which is endangering the health or welfare of persons in a State or States other than that in which the discharge or discharges (causing or contributing to such pollution) originate." Thus, as is stated in S. Rept. No. 638, *supra* at 9-10, "Section 5 . . . establishes the manner for Federal action in abating air pollution," by providing "authority for limited Federal partici-

As has been noted, the Air Quality Act of 1967 amended the clause in question to add "and enhance the quality of" after "to protect" (81 Stat. 485). The legislative history of the 1967 Act is equally barren of any indication that the Congress intended by that clause to establish a policy for the prevention of significant deterioration or to authorize any other Federal action not provided for in the substantive provisions of the legislation.²⁰ Here, too, every indication from the legislative history is to the contrary. For example, S. Rept. No. 403, *supra* at 3, states that:

"In order to facilitate the objective of a national abatement program which will enhance the quality of our Nation's air, the amendments provide the Secre-

pation and assistance under certain circumstances directed towards the abatement of specific air pollution problems." See, also, H. Rept. No. 508, *supra* at 8-9.

²⁰ The only suggestion, in this litigation or in the prior litigation, that the legislative history of the 1967 Act provides any indication of such a Congressional intent is the statement by the court below that "to a lesser degree, the legislative history of the" 1967 Act "expressed a policy of nondeterioration" (A. 56a). The court cited (*id.*, n. 30) a statement in S. Rept. No. 403, 90th Cong., 1st Sess. (1967), which "quoted Senator Muskie for the proposition that it was necessary 'to assure the lessening of current levels of pollution and to prevent further environmental deterioration in the future.'" That language was taken from a sentence which stated in full: "*We must define the steps necessary to assure the lessening of current levels of pollution and to prevent further environmental deterioration in the future,*" and Senator Muskie went on in the next quoted sentence to say that: "And recognizing the importance of the economic-technological-environmental relationship *we must develop the requisite framework to implement the desired goals.*" S. Rept. No. 403, *supra* at 8-9 (emphasis added). No one has suggested that the Congress in the 1967 Act did "define the steps necessary" to prevent significant deterioration or "develop the framework to implement" any "desired goal" in that regard, and no one has suggested that there is any other legislative history of the 1967 Act indicating an intent on the part of Congress to require prevention of significant deterioration.

tary of Health, Education, and Welfare with the following authority:

"(1) To request an immediate injunction to abate the emission of contaminants which present 'an imminent and substantial endangerment to the health of persons,' anywhere in the country;

"(2) To designate 'air quality control regions' for the purpose of implementing air quality standards, whenever and wherever he deems it necessary to protect the public health and welfare.

"(3) In the absence of effective State action in accordance with the provisions of the act, to establish ambient air quality standards for such regions.

"(4) In the absence of effective State action in accordance with the provisions of the act, to enforce such standards.

"(5) In the absence of action by the affected States, to establish Federal interstate air quality planning commissions." (Emphasis added.)

The "authority" conferred on HEW as thus generally described was conferred by substantive provisions of the legislation which are discussed in detail in the remainder of the Report (particularly at pp. 17-50). For present purposes, however, the important point is that it was the substantive authority which would thus be expressly conferred on HEW that was intended "to facilitate the objective of a national abatement program which will enhance the quality of our Nation's air" There is no suggestion that the stated purpose to "protect and enhance" the quality of the air was intended to confer some additional authority, such as the prevention of significant deterioration.²¹

²¹ Similarly, H. Rept. No. 728, 90th Cong., 1st Sess. (1967), at 1, states that the legislation was "intended primarily to pave the way for control of air pollution problems on a regional basis in accordance with air quality standards and enforcement plans de-

Indeed, under the 1967 Act "air quality control regions" were comprised of areas where, because of "urban-industrial concentrations, and other factors" (§ 107(a)), the air was so polluted that it "endangers the health or welfare of . . . persons" (§ 108(a)). 81 Stat. 491. Thus, as stated in S. Rept. No. 403, *supra* at 4, if "an area is not now a problem area," it is only if and when "the air quality . . . deteriorates below the level required to protect the public health and welfare" that HEW would be "required to designate that region for the establishment of air quality standards" Senator Muskie similarly stated that: "When the air quality of any region deteriorates below the level required to protect public health and welfare, the Secretary is required to designate that region for the establishment of air quality standards, enforceable by the Federal Government if the States fail to act." 113 Cong. Rec. 19172 (1967). In short, the procedures for the prevention of air pollution established by the 1967 Act were intended to be brought into play only when the quality of the air had deteriorated below the level specified in the ambient air quality standards, and thus plainly were not intended to prevent significant deterioration of air that would remain as clean as or cleaner than those standards would allow.

veloped by the States," with HEW being "empowered to initiate action to insure setting and enforcement of standards if a State failed to take reasonable action to achieve compliance." The Report goes on (pp. 1-3) to list 19 additional purposes of the legislation, none of which in any way suggests a purpose to prevent significant deterioration of air quality better than would be required by the ambient air quality standards. That Report, like the Senate Report, discusses the substantive provisions of the legislation at length (see, particularly, pp. 9-38). In contrast, the only specific reference in the reports to the statement of purpose in § 101(b)(1) is the bare statement that the "purposes of this title are revised, by revising paragraph (b)(1), to include provisions to protect 'and enhance the quality of' the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." H. Rept. No. 728, *supra* at 30 (S. Rept. No. 403, *supra* at 40 and 51, is almost identical).

Some reliance was placed below (see A. 56a, n. 30) upon the Guidelines for the Development of Air Quality Standards and Implementation Plans (1969), issued under the 1967 Act by HEW's National Air Pollution Control Administration. That reliance was based upon the statement in the Guidelines (§ 1.51) that, since an "explicit purpose of the Act is 'to protect and enhance the quality of the Nation's air resources,'" "[a]ir quality standards which, even if fully implemented, would result in significant deterioration of air quality in any substantial portion of an air quality control region clearly would conflict with this expressed purpose of the law." However, as it shows on its face, that Guideline was directed to the establishment of air quality standards under the 1967 Act, rather than to the deterioration of air cleaner than was required by those standards. And, as we have noted, under that Act the standards applied only in control regions comprising areas in which the air already was so dirty as to endanger public health or welfare. In short, the Guideline was directed to circumstances entirely different from those to which the significant deterioration regulations are directed, and the reliance by the court below upon the Guideline's use of the words "significant deterioration" is merely a play on words.

Consequently, the court below erred in finding from that Guideline an "administrative interpretation" that the 1967 Act "expressed a policy of nondeterioration" (A. 55a-56a), at least insofar as that "policy" was equated by the court to the kind of deterioration that the significant deterioration regulations are designed to prevent. A similar error was made in regard to two snippets of testimony from the Senate hearings on the 1970 Amendments, which also were relied on by the court below as showing such an "administrative interpretation" of the 1967 Act (see A. 57a-58a).

For example, HEW Secretary Finch testified that "it has been and will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with [the 'protect and enhance'] provision," and that "[w]e shall continue to expect States to maintain air of good quality where it now exists." *Air Pollution—1970*, Hearings before the Subcommittee on Air and Water Pollution of the Senate Public Works Committee, 91st Cong., 2d Sess. (1970), at 132-133. That statement by itself is ambiguous, for there is no indication therein what Secretary Finch considered to be either "significant deterioration" or "air of good quality."

It appears from the context of the statement, however, that Secretary Finch was saying that State plans should not permit deterioration to levels worse than the national standards and should continue to maintain the air at qualities which satisfy those standards. For, in the immediately preceding paragraphs of his testimony, the Secretary recognized that what "the States would have to spell out" were "the measures to be taken to achieve and preserve national air quality standards;" but that, at the same time, "[t]he provision for national . . . standard setting would not impair any State's right to establish standards requiring higher levels of air quality," so that the States "would have the option of designing their implementation plans to achieve or preserve higher than national quality levels, if they wished to do so." *Id.*, at 132. That express recognition of a State's *option* or right to *choose* whether air quality be maintained at a level higher than the national standards is inconsistent with the view that the Secretary also meant to say that the States are *required* to prevent significant deterioration of air that would remain as clean as or cleaner than the national standards allow.²²

²² The testimony by Secretary Finch was contained in a written statement submitted by Undersecretary Veneman. The other bit

In any event, the Court of Appeals conceded that the purported "administrative interpretation" of the 1967 Act as expressing a policy for the prevention of significant deterioration would not suffice in the absence of other evidence of "congressional acquiescence in the agency interpretation" when it enacted the 1970 Amendments (A. 59a).²³ But that court concluded that the

of testimony relied upon by the court below was made extemporaneously by Undersecretary Veneman at the time he submitted the Secretary's statement. While that testimony (see A. 57a) may seem to go somewhat further than the Secretary, it generally follows the Secretary's prepared testimony, and hardly could have been intended to contradict the Secretary. Moreover, Mr. Veneman agreed with Secretary Finch that the State plans would be required to spell out measures for attaining and maintaining the national standards, but that the legislation "would not impair any State's right to establish standards requiring higher levels of air quality" if it so chooses. *Air Pollution—1970*, *supra* at 143. Indeed, Mr. Veneman also testified: "Now, I am sure my attorneys and administrators would be shaken up about that, but what if we were to say that any State or locality that is above the national minimum standards that were adopted would not be permitted to go below what they have presently in effect?" *Id.*, at 159. In mentioning that possibility (in a dialogue with Senator Cooper), but noting that the Department's "attorneys and administrators would be shaken up" by it, the Undersecretary could not have understood that such a nondegradation requirement constituted either the "administrative interpretation" by HEW of the 1967 Act or what it in fact proposed in regard to the contents of the pending 1970 legislation.

²³ The Court of Appeals cited its own decision in *Chisholm v. F.C.C.*, — U.S. App. D.C. —, 538 F.2d 349 (1976), cert. den., No. 76-205 (1976), and partially quoted therefrom (see A. 59a, n. 34). The full discussion in *Chisholm*, including additional citations of supporting decisions by this Court, may be found at p. 361 of 538 F.2d. We do not agree, however, that "congressional acquiescence" in the "agency interpretation" of the 1967 Act would suffice to validate the significant deterioration regulations. This is not a case "where Congress has re-enacted the statute without pertinent change," as in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974), which was cited and quoted in the opinion below (A. 60a). The 1970 Amendments substantially revised the 1967 Act, including enactment of the entirely new § 110. At the very least, if the mandatory "shall approve" language in that section is to be disregarded, there would have to be substantial legislative history

"committee reports [on the 1970 Amendments] contain express language that the principle of nondeterioration was preserved by the Clean Air Act Amendments of 1970" (A. 60a). In fact, the court relied in that regard only upon a single passage from the Senate Report (A. 57a-58a). Indeed, that passage is the *only* piece of legislative history, from the enactment of the "to protect" language by the 1963 Act through enactment of the "and enhance" language by the 1967 Act and up to and including enactment of the 1970 Amendments, in which it even has been claimed, by the court below or by any litigant, that any member of the Congress has expressed the view that the "protect and enhance" purpose clause requires the prevention of significant deterioration.

That passage in S. Rept. No. 91-1196, 91st Cong., 2d Sess. (1970), at 11, reads as follows:

"The bill would not require the attainment of the air quality goals within a specified time period. Nevertheless, it is the Committee's view that progress in this direction should be made as rapidly as possible. In areas where air pollution levels already are relatively low, the attainment and maintenance of these goals should not require an extended time period. *In areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality. Once such national goals are established deterioration of air quality*

affirmatively indicating that the Congress so intended. Mere "acquiescence" in an "agency interpretation" that the "protect and enhance" purpose clause as contained in the 1967 Act expressed a "policy" of preventing significant deterioration surely would not be enough. Without more, for example, the reasonable conclusion would be that the Congress left the implementation of that policy to the States under § 116 and to the new source performance standards established under § 111. See pp. 35-38, *supra*, and pp. 53-54, *infra*.

should not be permitted except under circumstances where there is no available alternative. Given the varying alternative means of preventing and controlling air pollution—including the use of the best available control technology, industrial processes, and operating practices—and care in the selection of sites for new sources, land use planning and traffic control—deterioration need not occur." (Emphasis added.)

We note that the foregoing passage from the Senate Report does not mention or otherwise refer to either the "protect and enhance" purpose clause in § 101(b)(1) of the Act or the purported "administrative interpretation" by HEW of that clause as including a policy of preventing significant deterioration of air quality that would remain as good or better than the quality required by the national standards.²⁴ Plainly, therefore, that passage could not evidence Congressional acquiescence in such an administrative interpretation even apart from the fact, as we have demonstrated, that no such administrative interpretation existed. But however that may be, there are numerous other reasons why that passage does not justify the significant deterioration regulations.

(a) The language in the passage that we have emphasized in itself is ambiguous. It could mean one of two things: first, air that is "already equal to, or better than, the air quality goals" (i.e., the national secondary standards)²⁵ should be maintained at a level that is either equal to or better than the national standards (i.e., at a level which satisfies those standards) unless there is no

²⁴ Indeed, insofar as we have discovered, no member of Congress ever asserted, until after the *Ruckelshaus* case was instituted, that that purpose clause embodied a policy to prevent significant deterioration.

²⁵ Among other things, the bill that was enacted substituted the term "secondary ambient air quality standards" for the term "national goals" which was used in the Senate bill.

available alternative; or, second, air that is "better than" should be maintained at a level which is better than, and air that is "equal to" should be maintained at a level which is "equal to" the national standards, unless there is no available alternative.

(b) The second interpretation proves too much, insofar as the significant deterioration regulations are concerned, as it would not permit any deterioration except where there "is no available alternative." This reading would not permit "incremental" deterioration in any of the classes or the possibility of a Class III redesignation where deterioration down to the national standards is permitted by the regulations. See pp. 11-13, *supra*.

(c) The entire context of the above-quoted passage indicates that the first interpretation—air quality that is equal to or better than the national standards should continue to comply with those standards—was intended. The passage as a whole is directed to and elaborates upon "the Committee's view that," while the "bill would not require the attainment of air quality goals within a specified time period," nonetheless "progress in this direction should be made as rapidly as possible." The context of that passage within the Report as a whole further indicates that the first interpretation was intended. It appears in a section (pp. 9-11) devoted to the statutory provision (§ 109 of the Act) for the establishment of the national primary and secondary standards or goals at levels sufficient to protect the public health and welfare. The provisions of the bill relating to implementation plans (which became—as revised—§ 110 of the Act) are discussed in another section of the Report (pp. 11-15), which states, among other things, that the "bill . . . would require that each State . . . adopt a plan for the *implementation of standards at least as stringent as the national ambient air quality standards*" (p. 12; emphasis

added), and that the Secretary of HEW²⁶ would have "the authority to replace all or any portion of any implementation plan submitted by a State *where attainment of the nationally [sic] ambient air quality standard within the time required is not provided*" (p. 14; emphasis added).

(d) As the immediately foregoing excerpts from the Senate Report indicate, the provisions which became § 110 of the Act were in fact intended to authorize disapproval of State implementation plans, and Federal amendment of those plans, only if they did not provide for attainment and maintenance of the national standards. As that Report also states (at p. 12), the "Committee bill . . . would provide for the substitution of [Federal] authority if the State plan, or a portion thereof, is inadequate to attain the quality of ambient air established by the nationally promulgated ambient air quality standard." This is confirmed by the section-by-section analysis in the Senate Report. In regard to the provision of the bill which (with some revision) was enacted as § 110 of the Clean Air Act, the Report states (at p. 55), in part, that:

"The Secretary *shall approve* a plan if, among other things, it provides for *attainment of the standards* within 3 years, includes emission requirements and schedules of compliance, includes provisions for monitoring devices, includes effective procedures, including land use and air and surface transportation controls and permits, to insure that all air pollution sources will not prevent or interfere with the *attainment and maintenance of such standards and goals*, and provides that the State has adequate personnel, funding, and authority to carry out and enforce the

²⁶ While the Senate bill provided for the Secretary of HEW to exercise the Federal functions provided for therein, the bill enacted in 1970 provided that the Administrator of EPA would exercise those functions.

plan, including emergency powers comparable to section 303 of the Clean Air Act." (Emphasis added.)

The above quotation summarizes the Senate bill's version of the requirements specified in § 110(a)(2) of the Act. Hence, the Senate Report confirms the plain meaning of § 110(a)(2) that EPA "shall approve" a State implementation plan that satisfies those requirements.

(e) H. Rept. No. 91-1146, 91st Cong., 2d Sess. (1970), also affirmatively demonstrates that the Congress meant what it said by the "shall approve" language in § 110(a)(2) of the Act. Under the House bill, after establishment of the "national ambient air quality standards," a State would "adopt a plan for the implementation (principally by prescribing appropriate emission standards) and enforcement of such standards." *Id.*, at 2. If a State "does not adopt a plan or adopts a plan which does not meet the statutory requirements . . . , the Secretary may publish proposed regulations setting forth a State plan." *Ibid.* Thus, "if the State adopts such a plan [for the implementation, maintenance, and enforcement of the standard], such plan *will be applied* in such State, if the Secretary determines that—(1) the State plan *assures achieving such standard* within a reasonable time," includes adequate enforcement authority and provisions for intergovernmental cooperation, "and (4) such plan contains adequate provision for revision from time to time to take account of improved or more expeditious methods of *achieving the standards*." *Id.*, at 7-8 (emphasis added). Only if the State does not adopt an implementation plan which "meets [those] requirements" did the House bill authorize the proposal and promulgation of Federal "regulations setting forth a plan which would be applicable to such State." *Id.*, at 8.

(f) The Conference Report confirms that the "shall approve" language of § 110 as reported and enacted was

intended to mean just that. In discussing that provision, H. Rept. No. 91-1783, 91st Cong., 2d Sess. (1970), at 45, states:

"Under the House bill after promulgation of a national ambient air quality standard, each State was to . . . adopt a plan to implement such standard (or the more stringent State standard). The Administrator *was to approve the plan if it assured achievement of the standard within a reasonable time* and contained adequate provision for State enforcement, intergovernmental cooperation to attain standards, and revision of the plan under specified circumstances.

"The House bill authorized the Administrator to propose a plan applicable to any State, *if it failed to submit an acceptable plan* within the allotted time

"Under the Senate amendment each State was to . . . adopt a plan to implement the national ambient air quality standards (or the more stringent State standards) and national ambient air quality goals. The Administrator *was required to approve the plan if he found it provided for attainment of the standard* within three years from the date of approval of the plan

"The conference substitute follows the Senate amendment in establishing deadlines for implementing primary ambient air quality standards but leaves the States free to establish a reasonable time period within which secondary ambient air quality standards will be implemented" (Emphasis added.)

(g) As the above quotation from the Conference Report also indicates, the legislative history of the 1970 Amendments further demonstrates that the imposition of "more stringent" standards or requirement was intended to be left to the individual States. See pp. 35-37, *supra*.

For example, H. Rept. No. 91-1146, *supra* at 1, states that the "States will be left free to establish stricter standards for all or part of their geographic area." And, S. Rept. No. 91-1196, *supra* at 2, agrees that the "right of the States to set more stringent standards of air quality has been preserved." See, also, *id.*, at 10, 15 and 56. So, too, the legislative history demonstrates a congressional intent to rely upon the new source performance standards under § 111 of the Act for the Federal role in minimizing deterioration of clean air. See pp. 37-38, *supra*. "The purpose of this new authority" for the establishment of "Federal emission standards for new stationary sources" is "to prevent the occurrence anywhere in the United States of significant new air pollution problems arising from such sources" H. Rept. No. 91-1146, *supra* at 3. "Maintenance of existing high quality air is assured through provision for maximum control of new major pollution sources." S. Rept. No. 91-1196, *supra* at 2.²⁷

(h) The single passage in the Senate Report upon which the Court of Appeals relied for its decision upholding the significant deterioration regulations comprises one paragraph (about one-fourth of a page) of a Senate Report that is about 129 pages long. No one has even claimed that there is a comparable passage in the House Report, in the Conference Report or in the extensive floor debates that preceded enactment of the 1970 Amendments. In contrast, when the Congress did in fact consider whether or not the Act should be amended to include a significant deterioration provision, in the last session of the Congress, the proposed amendment was very controversial, and resulted in extensive discussion in the committee reports and floor debates.²⁸ We think

²⁷ Additional legislative history to the same effect is collected in *National Asphalt Pavement Ass'n v. Train*, *supra* at 783.

²⁸ See the Petition in No. 76-529, at 20-24.

it plain, therefore, that the single passage in the Senate Report, which in itself is at least ambiguous, is much too slim (if not nonexistent as) a foundation to support the superstructure of the significant deterioration regulations, overriding not only the plain language of § 110 of the Act but also three decisions by this Court holding that such language does indeed mean what it clearly says. The Congress could not conceivably have treated so lightly a purported requirement which, as EPA stated in proposing the regulations (38 F.R. 18986; A. 94a), "will have a substantial impact on the nature, extent, and location of future industrial, commercial, and residential development throughout the United States," and "could affect the utilization of the Nation's mineral resources, the availability of employment and housing in many areas, and the costs of producing and transporting electricity and manufactured goods." In any event, the legislative history of the 1970 Amendments, demonstrating that the Congress did in fact intend the "shall approve" language in § 110 to mean what it says, leaves no reasonable doubt about the matter.

7. *Conclusion.* The significant deterioration regulations cannot be upheld unless the express language of § 110 of the Clean Air Act is disregarded. Under that language, EPA "shall approve" State implementation plans that meet the requirements specified in § 110(a) (2), and EPA is authorized to promulgate regulations amending such a plan only insofar as it is not "in accordance with" those requirements. Those requirements do not include the prevention of significant deterioration, and no one has contended otherwise. We have shown that there is no basis for disregarding that express statutory language. It has been construed by this Court and by EPA to be mandatory in fact as well as in form, and the legislative history confirms that it was so intended by the Congress. The significant deterioration regula-

tions also are inconsistent with other provisions of the Act, and are not supported by the "protect and enhance" purpose clause in § 101(b)(1) of the Act.²⁹

The conclusion that the significant deterioration regulations are, therefore, invalid is consistent with reason as well as with the statute. After all, the national primary ambient air quality standards are intended to be fixed at levels "requisite to protect the public health" after "allowing an adequate margin of safety," and the national secondary standards are intended to be set at levels "requisite to protect the public welfare from any known or anticipated adverse effects" from air pollution. And further Federal protection of air quality is provided by the new source performance standards, under which a new stationary source of air pollution cannot be constructed or operated unless it uses the best available system of emission controls that is economically feasible.

Surely, it was reasonable for the Congress in such circumstances to leave any further protection of air quality

²⁹ The court below also relied to some extent by the "acceptance" of the *Ruckelshaus* decision "in a number of other circuits." See A. 62a, n. 36, and the accompanying text. As an examination of the opinions in most of the cases in the other circuits will disclose, they simply referred to the *Ruckelshaus* decision without purporting to make an independent judgment about the significant deterioration issue. While there was some discussion in *Natural Resources Defense Council, Inc. v. Environmental Pro. Ag.*, 489 F.2d 390, 408 (5th Cir., 1974), which was reversed in what we have been referring to as the *Train* case (421 U.S. 60), and in *Natural Resources Def. Coun., Inc. v. U.S. Environmental Pro. Agcy.*, 507 F.2d 905, 913-914 (9th Cir., 1974), the issue had not been briefed. In the Fifth Circuit, the nondegradation issue was raised in the petitioner's brief in a short two-page argument which simply stated that the issue had been settled by the *Ruckelshaus* decision, and EPA did not respond to that argument. In the Ninth Circuit, the issue was not even raised in the briefs of either party. In any event, for the reasons stated herein, to the extent that the decisions in other circuits provide any support for the decision below in this case, those decisions also are erroneous.

to the option of individual States and localities, as in fact was done by § 116 of the Act. While some States or localities might prefer air of the highest purity for esthetic or other reasons, other States or localities may prefer to encourage economic development to the extent consistent with the national primary and secondary standards and the other substantive provisions of the Clean Air Act. Leaving that decision to the option of the individual States and localities simply conforms with a policy of the Act which has existed from its outset, and which continues to be asserted (in § 101(a)(3)): "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments." But however that may be, the significant deterioration regulations plainly conflict with the Clean Air Act enacted by the Congress and should be held by this Court to be invalid.

II. The Provisions in the Regulations for Reclassifying Federal and Indian Lands Violate the Clean Air Act.

The significant deterioration regulations establish a classification system under which the increments of particulate matter and sulfur dioxide that would be allowed basically is related to the degree of economic growth or development deemed to be desirable. In Class I areas, practically any increase in those pollutants and thus economic growth is prohibited; in Class II areas somewhat greater increases are allowed, but significantly less than would be allowed by the national primary and secondary standards; and in Class III areas, those pollutants and economic growth could be increased to the level allowed by the national standards. See pp. 11-13, *supra*.

While all areas throughout the country initially were placed in Class II, the regulations establish a reclassification procedure. In general, a State may propose reclassification of an area within its boundaries, based upon

its consideration of anticipated growth and the social, environmental and economic effects thereof upon the area and upon regional or national interests, subject to review and approval by EPA. However, a Federal land manager also may propose reclassification of Federal land under his jurisdiction (to a "more restrictive designation" only), and only the governing body of an Indian tribe may propose reclassification of the tribe's lands if the State in which the lands are located does not exercise jurisdiction over them under other laws. On the other hand, private and municipal landowners have no right to propose a reclassification of their lands, or to require the State to consider doing so, or to obtain EPA review if a State does not do so. See p. 12, *supra*. And, a reclassification of Federal or Indian land will (if more restrictive) govern the use of adjoining lands, up to 60 or 100 miles from the borders of the Federal or Indian land, if by reason of wind drift the level of particulate matter or sulfur dioxide in the air over the Federal or Indian lands would be affected. See p. 11, *supra*.

There will be no need to reach the issues as to the validity of those reclassification provisions if the Court holds, as we urge in Part I of our Argument, that the regulations are invalid in their entirety. For purposes of this part of our Argument, therefore, we necessarily assume a holding that EPA does have general authority to issue regulations preventing significant deterioration. We demonstrate below that, even so, the provisions for reclassification of Federal and Indian lands are inconsistent with the Clean Air Act. And, although the question does not appear to have been included in this Court's limited grant of certiorari, we also shall demonstrate that the Court of Appeals erred in holding that the issue as to the validity of the reclassification provisions is not ripe for judicial review.

1. *The reclassification provisions are in derogation of the primary responsibility of each State for assuring air quality within its boundaries.* The enactment of the 1970 Amendments to the Clean Air Act marked the beginning of a substantial Federal role in establishing national standards and requirements regarding air pollution, but the primary responsibility for implementing the Federal standards or requirements clearly was intended to remain with the individual States. See *Train v. Natural Resources Def. Council*, *supra* at 64. Section 107(a) of the amended Act provides that:

"Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State." (Emphasis added.)

That statutory delegation of responsibility expressly extends throughout "the entire geographic area comprising such State" without any exception being made—either in § 107 or elsewhere in the Act—for either Federal or Indian lands. In accordance with the primary responsibility thus delegated, it is an individual State which has the authority under § 110(a) to design an implementation plan, applicable to "each air quality control region (or portion thereof) within such State," which will satisfy the national standards and requirements in the manner deemed most responsive to local needs and conditions. Under § 110(c), EPA can promulgate regulations amending a State implementation plan only if, and insofar as, the State fails to develop a plan which adequately complies with the requirements of the Act, and such regulations become part of a State plan or plans rather than comprising an independent Federal imple-

mentation plan. See pp. 4-5, *supra*. And, it is only the individual States and political subdivisions thereof that are authorized by § 116 to impose air quality standards and emission limitations that are more stringent than those required by the Clean Air Act.

The legislative history of the 1970 Amendments demonstrates that the Congress did not intend the responsibility and authority delegated to the States by the text of the Act to be a mere gesture. Thus, in discussing provisions allowing Federal enforcement of implementation plans only as a supplement to State enforcement, S. Rept. No. 91-1196, *supra* at 21, states that:

"The Clean Air Act as amended recognizes that the primary responsibility for control of air pollution rests with State and local government. While [the section] would restructure the enforcement authority available to the Secretary, the Committee does not intend to diminish either the authority or the responsibility of State and local governments."

The continuing authority of the States to formulate the means for achieving control of air pollution was also noted and approved repeatedly in floor debate as, for instance, when Sen. Cooper, the ranking minority member of the committee which drafted the bill, noted that in formulating implementation plans, "States and communities must make economic decisions, and decisions on the future growth of their areas and the kind of life they want, in considering alternative means of achieving clean air." 116 Cong. Rec. 32918 (1970).³⁰

In short, the 1970 Amendments "explicitly preserved the principle" that each State should have the primary

³⁰ See also, *e.g.*, *id.*, at 33114-15 (Sen. Prouty) ("[I]t is the right and duty of each State to develop its own plans to implement the standards set by the Secretary."); *id.*, at 42520 (Rep. Staggers) ("The States on the other hand will have primary responsibility for the enforcement of State plans")

responsibility for assuring air quality within its boundaries. *Hancock v. Train*, *supra* at 169; *Train v. Natural Resources Def. Council*, *supra* at 64. This latitude given the States, within the general framework of the Federal standards and time requirements, to design and implement the actual air quality plans is essential to the development of plans which will best respond to local environmental and economic needs.³¹

Indeed, in proposing the significant deterioration regulations, EPA itself acknowledged that the Act "places primary responsibility for the prevention and control of air pollution on the States and local governments" (39 F.R. 31001; A. 167a), and that (*ibid.*):

"Any policy to prevent significant deterioration involves difficult questions regarding how the land in any area is to be used. Traditionally, these land use decisions have been considered the prerogative of local and State governments"

³¹ See *Washington v. General Motors Corp.*, 406 U.S. 109, 114, 115-116 (1972):

"Air pollution is, of course, one of the most notorious types of public nuisance in modern experience. Congress has not, however, found a uniform, nationwide solution to all aspects of this problem and, indeed, has declared 'that the prevention and control of air pollution at its source is the primary responsibility of States and local governments.' . . . 42 U.S.C. § 1857 (a) (3)."

* * * *

"[G]eophysical characteristics which define local and regional airsheds are often significant considerations in determining the steps necessary to abate air pollution Thus, measures which might be adequate to deal with pollution in a city such as San Francisco, might be grossly inadequate in a city such as Phoenix, where geographical and meteorological conditions trap aerosols and particulates."

"As a matter of law as well as practical necessity corrective remedies for air pollution, therefore, necessarily must be considered in the context of localized situations."

But while EPA goes on to state (*ibid.*) that "in the regulations promulgated herein, the primary opportunity for making these decisions is reserved for the States and local governments," that plainly is not true insofar as Federal land managers and the governing bodies of Indian tribes are given independent authority to propose reclassification of lands under their respective jurisdictions, subject only to approval by EPA. This is emphasized by the fact that a reclassification of Federal lands pursuant to a proposal by a Federal land manager overrides any reclassification of such lands pursuant to a State proposal (40 C.F.R. § 52.21(c)(3)(iv)), and a State has no authority to propose redesignation of Indian lands within its boundaries as to which the governing body of an Indian tribe is given such authority.

Despite the responsibility and authority which a State bears under § 107(a) of the Act to assure air quality within its boundaries, a State has no power even to review a reclassification proposed by a Federal land manager or Indian governing body. Should a State object to a reclassification proposed by one of those entities, its only recourse is to protest to EPA, after which that agency will determine if the reclassification "appropriately balances" social, economic and environmental concerns of that and surrounding areas and national interests. See pp. 12-13 *supra*. In sum, the States, whose authority and responsibility to make air quality and land use decisions in the development and enforcement of § 110 implementation plans were carefully preserved by the Congress, have no primary role in the reclassification decisions by Federal land managers and Indian governing bodies under the significant deterioration regulations.

The States are largely excluded from those decisions despite the fact that the effects of reclassifying Federal or Indian lands extend far beyond the areas covered by

such lands. Reclassification of Federal or Indian lands thus impairs the ability of a State to develop a coherent air quality and land use plan for adjoining private and State lands. The regulations explicitly provide that the construction or modification of a new source covered by the regulations will not be permitted if the effect of that source on air quality concentrations will cause a violation either of the air quality increments applicable in the immediate area or the increments applicable in any other area. 40 C.F.R. § 52.21(d)(2)(i). EPA itself has emphasized the drastic effect of this provision:

"Calculations have shown that because of the small air quality increments specified for Class I areas, these levels can be violated by a source located many miles inside an adjacent Class II or III area. For example, a power plant which just meets the Class II increment for SO₂ could under some conditions violate the Class I increment for SO₂ 60 or more miles away Therefore, wherever a Class I area adjoins a Class II or III area, the potential growth restrictions, especially for power plant development, extend well beyond the Class I boundaries into the adjacent areas. A similar situation exists, to a greater or lesser degree, wherever areas of different classification adjoin each other . . . [I]t should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment. . . ." 39 F.R. 42512; A. 218a-219a.

EPA went on to state that the maximum distance at which this "drift factor" would limit growth outside a Class I area would be 60 to 100 miles. (39 F.R. 42513; A. 219a-220a). The reclassification of Federal or Indian lands, then, particularly to Class I, would limit pollutant increases to the increments of that class, and thus dictate

growth and development, not only on those lands, but also on adjacent State and private lands for many miles around.

This nullification of the primary responsibility of each State "for assuring air quality within the entire geographic area comprising such State" occurs in every State in which any Federal or Indian land is located. Its most pervasive effect, however, is in the western States because of the widespread incidence of Federal and Indian lands in such States, as is shown by the map attached as Appendix C hereto. Indeed, the checkerboard pattern which generally prevails in the distribution of Federal lands in several western States results in most, if not all, other lands being located less than the distance from Federal or Indian lands in which the "drift factor" may be operative. The "primary responsibility" of those States has been drained of virtually all substance, insofar as classification of lands for purpose of the significant deterioration regulations is concerned, and decisions concerning economic growth and development that are of vital importance to the peoples of those States have been handed over in large measure to Federal land managers and the governing bodies of Indian tribes.

We think it obvious, therefore, that the provisions in the regulations for the reclassification of Federal and Indian lands are invalid, even if the Act is construed to require the prevention of significant deterioration of air that nonetheless will comply with the national primary and secondary standards. Those provisions plainly are incompatible with the Act's delegation to the individual States of primary authority to assure air quality within the entire geographic area of the particular State. This is particularly so since the regulations effectively deprive a State of that primary authority not only in regard to Federal and Indian lands, but also in regard to adjacent State and private lands for a distance of up to 60 or more

miles from the boundaries of the Federal and Indian lands.

2. *The reclassification provisions arbitrarily discriminate against private and municipal landowners.* As we have noted, regulations promulgated by EPA under § 110 (c) of the Act revise and become a part of State implementation plans. In effect, EPA acts as a surrogate for a State insofar as the State fails to exercise its primary authority to devise an implementation plan that meets the requirements of the Act. But EPA has gone far beyond that role in the reclassification provisions of the significant deterioration regulations.

The only landowners or managers granted an independent right to propose reclassification of their lands are Federal land managers and Indian governing bodies. No private or municipal landowner or manager is given such powers by the regulations and, indeed, the regulations do not even provide any procedure by which those landowners may suggest to the States that their lands be reclassified. And, if a State should refuse to consider or propose reclassification of such lands, the private and municipal landowners or managers have no right under the regulations to have that refusal reviewed by EPA.

Neither § 110(c) nor any other provision of the Clean Air Act authorizes or requires such discrimination by a State against its own private landowners and local governmental units in favor of Federal and Indian landowners or managers. Surely, it is most unlikely that a State would voluntarily discriminate in that manner, and it is virtually impossible that all of the States would do so. Consequently, by incorporating such discriminatory provisions in the implementation plans of all States, in the exercise of its role as a surrogate for the States, EPA has acted arbitrarily and capriciously even if its actions in that regard were not contrary to express provisions of the Act.

3. *The provisions for reclassification of Federal lands are inconsistent with § 118 of the Act and are without any statutory basis.* As revised by the 1970 Amendments, § 118 of the Act provides in part that:

"Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. . . ." (Emphasis added.)

Section 118 goes on to authorize the President to exempt agencies in the executive branch from that requirement, for periods of up to one year, in limited circumstances that are not applicable here.

Section 118 is the only statutory provision cited by EPA in attempting to justify its promulgation of the provisions in the regulations authorizing Federal land managers to propose reclassification of Federal lands. EPA stated (39 F.R. 42513; A. 222a) that:

"[T]he regulations have been revised to subject Federal lands to State redesignations but reserve to the Federal Land Manager the authority to subject such lands to a more stringent designation. This approach is consistent with section 118 of the Clean Air Act (42 U.S.C. 1857f) which requires that Federal agencies having jurisdiction over any property or facility meet substantive State air pollution control standards and limitations. There is nothing in the Clean Air Act or the legislative history of that Act that indicates the Congress intended to preclude the Federal Government from meeting more restrictive standards than are imposed by the States. This provision also ensures that national forests and parks can be pro-

tected by the Federal Government from deterioration of air quality. . . ."

On its face, this comment does not even purport to claim that the provisions are authorized by § 118, but merely that they are "consistent" with that section. But the special powers given Federal land managers are, in fact, wholly inconsistent with § 118. That section was not intended to afford a grant of power to Federal agencies, but rather to be a restraint directing "that all Federal agencies shall comply with the requirements of the Act just as a nonfederal agency or individual must do in the administration of any real property or facility and in the conduct of any activity." S. Rept. No. 91-1196, *supra* at 59. While the decision in *Hancock v. Train*, *supra*, held that § 118 did not submit Federal agencies to State permit requirements, it recognized that the "parties rightly agree that § 118 obligates Federal installations to conform to State air pollution standards or limitations and compliance schedules." 426 U.S., at 181.

Far from serving as a source of authority for Federal land managers to adopt substantive standards which will control activities on State and private lands, § 118 thus stands for the principle that individual Federal entities have no greater statutory power to set substantive standards for air quality than any private landowner does. EPA's comment that the Act does not preclude the Federal Government from meeting more restrictive standards is quite beside the point. Even without any authority in these regulations, the Federal Government could adopt restrictive policies designed to enhance air quality on its lands, in the exercise of its proprietary powers over those lands.³² The regulations, however, are far more than merely declaratory of the Federal Government's proprie-

³² We note, however, that neither § 118 nor any other provision of the Clean Air Act purports to give EPA any supervisory authority over actions by other Federal agencies in that regard.

tary powers over its lands. They grant the Federal land managers affirmative powers over the use of private and State land nowhere envisioned by the Act. See pp. 63-65, *supra*.

EPA also suggested in its explanatory comment that the provision in question "ensures that national forests and parks can be protected by the Federal Government from deterioration of air quality."³³ But here again, such reclassification authority is not necessary insofar as the use of such Federal lands are concerned, as the Government can limit or preclude such use in the exercise of its proprietary authority. Moreover, each State's responsibility under § 107(a) of the Act to assure air quality within "the entire geographic area comprising such State" includes air quality in national parks and forests located within the State. And, the provisions of the regulations governing State-proposed reclassifications require consideration of "any impacts of such proposed redesignation upon regional or national interests." See p. 12, *supra*.

In any event, the reclassification powers granted to Federal land managers and Indian governing bodies can be exercised on the basis of considerations unrelated to air quality effects. They need consider only anticipated growth in the area, and the social, economic and environmental effects of such growth upon that and other areas and upon regional and national interests. See pp. 12-13, *supra*. These considerations permit reclassification of Federal and Indian lands without identification of any adverse air quality effects that otherwise could or would result. Since the Federal Government can prevent construction of any new sources of pollution upon its own lands, entirely apart from this reclassification

³³ The makeweight nature of that suggestion is indicated by the fact that the reclassification provisions apply to all Federal lands, and thus are not limited to national parks and forests.

authority, the practical purpose and effect of such a reclassification must be to prevent or limit construction of new sources on adjacent private or State lands which the reclassification also would interdict by reason of the "drift factor" for as much as 60 or 100 miles distant. And, this could be done, not because of some demonstrable adverse effect upon air quality over the Federal lands, but because the Federal land manager is opposed to anticipated growth in the adjoining areas. In short, this aspect of the regulations transforms the Act into an instrument for Federal control over local growth and development on non-Federal lands, rather than being necessary to prevent deterioration of air quality in Federal parks or national forests.

For these reasons, we submit that § 118 of the Act is not consistent with the reclassification authority conferred by the regulations upon Federal land managers, but rather is inconsistent with that authority, and that the other justifications suggested by EPA are equally unpersuasive.

4. *The provisions for reclassification of Indian lands do not have any statutory basis.* In promulgating the regulations, EPA did not refer to any statutory authority for the provisions regarding reclassification of Indian lands by Indian governing bodies. Those provisions were derived from a misconception of the relationship among Indian tribes, the States and the Federal Government. EPA explained that they were drawn so as not to alter existing relationships between Indians and the State and were "consistent with the independent status of Indian lands not subject to State laws" (39 F.R. 42513; A. 223a).

EPA's assumption that the status of Indian lands would preclude the exercise of State authority over them under the significant deterioration regulations is totally unwar-

ranted. Allowing State control of classification of Indian lands under the regulations would not represent an independent assumption of State jurisdiction over Indian lands condemned by cases such as *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164 (1973), but rather would be to fulfill the State's duty under § 107(a) of the Clean Air Act to assure air quality within its "entire geographic area." It is well settled that such a general Act of Congress applies to Indians and their lands, "in the absence of a clear expression to the contrary" *F.P.C. v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960). See, e.g., *Squire v. Capoeman*, 351 U.S. 1 (1956). In short, Congress, which has plenary powers over Indian lands, *Antoine v. Washington*, 420 U.S. 194, 203-204 (1975), has permitted, indeed required, the States to exercise over Indian lands the regulatory powers which the EPA would deny them.

Since the powers granted by these regulations to Federal land managers and Indian governing bodies are completely without a statutory basis and are directly in conflict with the primary role given to the States in implementing the Clean Air Act, this Court should hold those portions of the regulations to be invalid even if it upholds the remainder of the regulations.

5. *These issues are ripe for judicial review.* Although the Court of Appeals did not pass upon the merits of the reclassification provisions, holding instead that issues going to the validity of those provisions were not ripe for judicial review, we are not at all certain that the Court desires briefing or argument of the ripeness question. That question does not appear to be "fairly comprised" within the question which the Court itself stated in its limited grant of certiorari (A. 292a): "whether the Clean Air Act permits the Environmental Protection Agency to adopt regulations which grant to federal land managers and Indian governing bodies power to reclassify federal

and Indian lands within their jurisdiction." See Supreme Court Rules 23-1(c) and 40-1(d)(1) and (2). Thus, the Court may have concluded already that the ripeness holding by the court below is erroneous, so as to desire arguments only on the merits of the reclassification provisions. But since we are not certain that that is true, we shall demonstrate why the ripeness holding is erroneous.

The Court of Appeals concluded that the reclassification provisions were not ripe for review because no Federal or Indian lands had yet been redesignated and the mere "reservation of power to federal land managers and Indian governing bodies should have no effect on present conduct" (see pp. 15-16, *supra*).³⁴ But the arbitrary discrimination against private landowners and managers, who are not allowed to propose reclassifications, exists regardless of whether Federal land managers or Indian governing bodies exercise the powers which they have been granted. More significantly, perhaps, the mere existence of those powers may affect "present conduct" of petitioners and others.

Under the reclassification provisions as interpreted and applied by EPA, an electric generating utility or other company contemplating new construction on lands adjacent to Federal or Indian lands cannot safely base its

³⁴ The Court of Appeals also adverted to the theoretical possibility that EPA might approve substitute State plans that would not include the powers granted to Federal land managers and Indian governing bodies. That possibility also existed in regard to other provisions of the regulations which the Court of Appeals did review on the merits, and it is always theoretically possible that an agency will replace allegedly invalid regulations at some indefinite future time. If such a possibility made issues as to the validity of the regulations unripe, such regulations could never be reviewed except in the context of an actual application thereof—which clearly is not the law. See, e.g., *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 199-200 (1956); *Frozen Food Exp. v. United States*, 351 U.S. 40, 43-45 (1956); *Columbia System v. United States*, 316 U.S. 407, 418-419 (1942).

plans upon the existing classification of those lands. If a Federal land manager or Indian governing body merely announces that it is considering proposing a reclassification, both pending and future applications for permission to construct a new source will not be granted until EPA has acted upon the reclassification proposal and will be subject to the incremental limits applicable under the revised classification if the proposal is approved. See p. 13, *supra*. Thus, when Montana Power Company and four associated petitioners applied for a permit to build two additional units at their Colstrip, Montana, electric generating complex, EPA stated that it could not take final action upon the application, even though the units would not violate Class II standards for the area, until it has passed upon a proposal by the Northern Cheyenne Indian Tribe to reclassify its neighboring reservation to Class I.³⁵

In these circumstances, where the mere existence of a regulation means that a business "cannot cogently plan its present or future operations," *United States v. Storer Broadcasting Co.*, *supra* at 200, issues as to the validity of the regulations plainly are ripe for review. As long ago as *Euclid v. Ambler Co.*, 272 U.S. 365 (1926), this Court held that judicial review is appropriate when the existence of a government regulation disrupts a party's planning for future development of property. This is particularly so where "the fitness of the issues for judicial

³⁵ See the September 16, 1976 public notice reproduced in Appendix B hereto. In subsequent judicial proceedings, the utilities obtained a declaratory judgment that the units are not subject to preconstruction review under the regulations because they had "commenced construction" on or before June 1, 1975 within the meaning of 40 C.F.R. § 52.21(b)(7). *Montana Power Co., et al. v. Environmental Protection Agency, et al.*, 9 ERC 2096 (D. Mont., January 27, 1977). That decision has been appealed. EPA has since "propose[d] for public comment approval of" the reclassification of the Northern Cheyenne reservation. 42 F.R. 21819 (April 29, 1977).

decision," as well as "the hardship to the parties of withholding court consideration," is apparent. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). The question of whether the reclassification provisions violate the Clean Air Act raises a pure question of law and is sharply focussed. Neither in its promulgation of those provisions nor in its defense of them below has EPA suggested that their validity rests on factual rather than legal judgments. Since further development of a factual record is not necessary to illuminate consideration of the legal issues, those issues are fit for judicial decision at this time. Compare *Toilet Goods Assn. v. Gardner*, 387 U.S. 158, 163-164 (1967), with *Gardner v. Toilet Goods Assn.*, 387 U.S. 167, 171 (1967), and *Abbott Laboratories v. Gardner, supra* at 149.

Even if the ripeness issue were doubtful, judicial review at this time would be warranted by the Clean Air Act's special provisions for judicial review. The significant deterioration regulations were promulgated as amendments to the State implementation plans, and review of them must accordingly be had under § 307(b)(1) of the Act, 42 U.S.C. § 1857h-5(b)(1), which provides that:

"A petition for review of the Administrator's action in . . . promulgating any implementation plan under section 110 . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, . . . or after such date if such petition is based solely on grounds arising after such 30th day."

Congress adopted the provisions of § 307(b)(1) limiting the forum and time period for judicial review in order to assure that while judicial review of administrative actions which "would clearly affect the interests of persons" would be available, it would be possible only "with-

in controlled time periods" so as "to maintain the integrity of the time sequences provided throughout the Act" S. Rept. 91-1196, *supra* at 40-41. See also, 116 Cong. Rec. 33117 (1970) (Sen. Cooper).

The issues regarding the validity of the reclassification provisions are purely issues of law and came into existence when those regulations were promulgated. Hence, petitions challenging those provisions come within the requirement in § 307(b)(1) that they "shall be filed within 30 days from the date of such promulgation," as in fact was done. In *Buckley v. Valeo*, 424 U.S. 1, 117 (1976), this Court recognized that the ripeness doctrine must be applied in the light of the Congressional purpose in enacting a special jurisdictional statute providing for expedited judicial review, and held that it therefore was "warranted in considering all . . . aspects of the Commission's authority which have been presented by the certified questions."

To give considerable weight in this manner to an expedited review statute does not undercut the ripeness doctrine; it merely indicates that, when Congress has determined that the administrative scheme would best be served by early and definitive judicial review, one of the principal rationales for the ripeness doctrine, that of protecting administrative agencies from premature judicial intervention, see *Abbott Laboratories v. Gardner*, *supra* at 148, is inapposite. Here too, Congress, in enacting § 307 of the Clean Air Act, was evidently concerned to have questions about the legality of regulations and implementation plans settled as expeditiously as possible in order to achieve the Clean Air Act's goal of requiring States "to attain air quality of specified standards, and to do so within a specified period of time." *Train v. Natural Resources Def. Council, Inc.*, *supra* at 64-65 (1975). To further that Congressional purpose, this Court should proceed to review the provisions concerning

Federal land managers and Indian governing bodies at this point.

There is even a more pressing need for judicial review at this time in the present case than in *Buckley*. Not only will judicial review at this point help fulfill the Congressional purpose, but it is also necessary if petitioners are to have any opportunity to challenge EPA's authority to impose these provisions, a problem not present in *Buckley*.³⁶ By providing that a petition to review a State implementation plan may be filed "only" in the appropriate Court of Appeals, and "shall" be filed within 30 days of promulgation of the plan, § 307(b) establishes the exclusive method for judicial review of the plans, as every Court of Appeals which has considered the question has held.³⁷ After the 30-day period allotted for filing a petition for review has passed, a petition for review may be filed "only if the petition is 'based solely on grounds arising after such 30th day.'" *Union Electric Co. v. EPA*, *supra* at 253 (emphasis added).

In short, to apply the ripeness doctrine to prevent review in this proceeding is not merely to defer review, but to preclude it entirely. Such an application of the doctrine is not countenanced by the decision in *Toilet Goods Association, Inc. v. Gardner*, *supra* at 165, where this Court held the point at issue not ripe for review

³⁶ Unlike § 307 of the Clean Air Act, § 315 of the Federal Election Campaign Act of 1971, under which review was sought in *Buckley*, does not have a 30-day limitation period, nor does it preclude review under other bases of jurisdiction, such as 28 U.S.C. § 1331.

³⁷ *Friends of the Earth v. Carey*, — F.2d —, 9 ERC 1641, 1648 (2d Cir., 1977); *District of Columbia v. Train*, — U.S. App. D.C. —, 533 F.2d 1250, 1254 (1976); *City of Highland Park v. Train*, 519 F.2d 681, 688-689 (7th Cir., 1975), cert. den., 424 U.S. 927 (1976); *Plan for Arcadia, Inc. v. Anita Associates*, 501 F.2d 390, 392 (9th Cir., 1974), cert. den., 419 U.S. 1034 (1974); *Getty Oil Company (Eastern Operations) v. Ruckelshaus*, 467 F.2d 349 (3d Cir., 1972), cert. den., 409 U.S. 1125 (1973).

only after assuring itself that the application of the regulations could later "be promptly challenged through an administrative procedure, which in turn is reviewable by a court."

As we noted at the outset of this discussion, in limiting its grant of certiorari to the question of the validity of the reclassification provisions, this Court may have determined that the ripeness holding by the Court of Appeals is erroneous. But if the Court has not already reached that conclusion, it should do so as is shown above.

CONCLUSION

For the reasons stated in Part I of our Argument, this Court should reverse the judgment below and hold that the significant deterioration regulations are not authorized by the Clean Air Act and are invalid. Even if the Court should hold otherwise in that regard, for the reasons stated in Part II of our Argument it should hold that the provisions for reclassification of Federal and Indian lands by Federal land managers and Indian governing bodies violate the Clean Air Act.

Respectfully submitted,

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APPENDICES

APPENDIX A

§ 101, 77 Stat. 392-393 (1963), 81 Stat. 485 (1967), 42 U.S.C. § 1857

(a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) The purposes of this title are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

* * *

§ 107, 84 Stat. 1678 (1970), 42 U.S.C. § 1857c-2

(a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

* * *

§ 108, 84 Stat. 1678-1679 (1970), 42 U.S.C. § 1857c-3

(a) (1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) which in his judgment has an adverse effect on public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has in-

cluded such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

* * *

§ 109, 84 Stat. 1679-1680 (1970), 42 U.S.C. § 1857c-4

(a) (1) The Administrator—

(A) within 30 days after the date of enactment of the Clean Air Amendments of 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary am-

bient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1) (B) of this subsection shall apply to the promulgation of such standards.

(b) (1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

§ 110, 84 Stat. 1680-1683 (1970), 88 Stat. 256-258 (1974), 42 U.S.C. § 1857c-5

(a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision

thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations,

and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for inter-governmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that

in section 303, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3) (A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this Act and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public

notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(4) The procedure referred to in paragraph (2) (D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(b) The Administrator may, whenever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) (1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a) (2) (H).

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

* * *

(d) For purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard in a State.

* * *

§ 111, 84 Stat. 1683-1684 (1970), 42 U.S.C. § 1857c-6

(a) For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which re-

flects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

(b) (1) (A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare.

(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall propose regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modifications as he deems appropriate. The Administrator may, from time to time, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(c) (1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards (except with respect to new sources owned or operated by the United States).

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d) (1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 110 under which each State shall submit to the Administrator a plan which (A) establishes emission standards for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or 112(b)(1)(A) but (ii) to which a standard of performance under subsection (b) would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such emission standards.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 110(c) in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 113 and 114 with respect to an implementation plan.

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

* * *

§ 113, 84 Stat. 1686-1687 (1970), 88 Stat. 259 (1974), 42 U.S.C. § 1857c-8

(a) (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the

person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b).

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person—

(A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b).

(3) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of section 111(e) (relating to new source performance standards), 112(c) (relating to standards for hazardous emissions), . . . or is in violation of any requirement of section 114 (relating to inspections, etc.), he may issue an order requiring such person to comply with such section or requirement, or he may bring a civil action in accordance with subsection (b).

(4) An order issued under this subsection (other than an order relating to a violation of section 112) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers.

(b) The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person—

(1) violates or fails or refuses to comply with any order issued under subsection (a); or

(2) violates any requirement of an applicable implementation plan during any period of Federally assumed enforcement more than 30 days after having been notified by the Administrator under subsection (a)(1) of a finding that such person is violating such requirement; or

(3) violates section 111(e), 112(c), or 119(g); or

(4) fails or refuses to comply with any requirement of section 114.

Any action under this subsection may be brought in the district court of the United States for the district in

which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency.

(c) (1) Any person who knowingly—

(A) violates any requirement of an applicable implementation plan during any period of Federally assumed enforcement more than 30 days after having been notified by the Administrator under subsection (a)(1) that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order issued by the Administrator under subsection (a), or

(C) violates section 111(e), section 112(c), or section 119(g)

shall be punished by a fine of not more than \$25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than six months, or by both.

* * *

§ 116, 84 Stat. 1689 (1970), 88 Stat. 259 (1974), 42 U.S.C. § 1857d-1

Except as otherwise provided in sections 119(c), (e), and (f), 209, 211(c)(4), and 233 (preempting certain State regulation of moving sources) nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

* * *

§ 118, 84 Stat. 1689-1690 (1970), 42 U.S.C. § 1857f

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 111, and an exemption from section 112 may be granted only in accordance with section 112(c). No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall

have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

* * *

§ 307, 84 Stat. 1707-1708 (1970), 88 Stat. 259 (1974), 42 U.S.C. § 1857h-5

* * *

(b) (1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202 (b) (1)), any determination under section 202 (b) (5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c) (2) (A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

(c) In any judicial proceeding in which review is sought of a determination under this Act required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

* * *

APPENDIX B

SEPTEMBER 16, 1976

U. S. ENVIRONMENTAL PROTECTION AGENCY PUBLIC NOTICE

Section 52.21(e) Title 40 CFR regarding the prevention of significant deterioration of air quality provides that prior to final determination on an application to construct a new source, opportunity be given for public comment on the information submitted by the owner or operator and on the analysis underlying the proposed approval or disapproval. The regulation further requires that such information be made available in at least one location in the affected Air Quality Control Region and that the public be allowed a period of 30 days in which to submit comments.

Notice is hereby given that the Environmental Protection Agency, pursuant to 40 CFR, Section 52.1382 (Significant Deterioration of Air Quality) proposes to grant conditional approval of a request by the following applicant to construct a new source in the State of Montana:

The Montana Power Company
40 East Broadway
Butte, Montana 59701

This permit application is being reviewed notwithstanding the fact that the Agency has yet to rule on the applicant's request that the Agency reconsider its earlier decision that the facility is subject to this new source review procedure. In addition, this proposal is subject to the procedure set forth in Section 52.21(d)(5), discussed herein below, which requires that pending permit applications be held in abeyance if consideration of a Class I redesignation is announced prior to permit approval.

The applicant has requested permission to construct two 700 megawatt coal fired electric generating plants in Colstrip, Montana. It has been determined that proper operation of the facility will not cause a violation of the Class II sulfur dioxide or particulate significant deterioration increments. It has also been determined that the plant will reduce emissions by the application of best available control technology as defined in 40 CFR, Section 52.01(f). The Agency's analysis of the aforementioned application, together with the application, is available for public inspection at the Rosebud County Public Library, 201 North 9th Avenue, Forsyth, Montana; and the Denver U.S. Environmental Protection Agency Regional Office. Additional information developed by the State of Montana concerning potential air pollution from the proposed plant during the new source review procedures is available from the State of Montana Air Quality Bureau, Department of Health and Environmental Sciences, State Capitol, Helena, Montana 59601.

The conditions under which the Agency is considering approval are as follows:

a. Unit 3 or Unit 4 shall not cause to be discharged into the atmosphere sulfur dioxide at a rate exceeding 585 grams per second.

b. A continuous monitoring system for measuring sulfur dioxide emissions shall be installed, calibrated, maintained, and operated by the owner or operator. Procedures to be followed for monitoring sulfur dioxide emissions are specified in applicable Sections of 40 CFR 60.45. For the purpose of demonstrating compliance with the emission regulation of conditions (a), 40 CFR 60.45(g) (2) is revised to read as follows:

(2) Sulfur dioxide. Excess emissions for affected facilities are defined as

(i) Any three-hour period during which the average emissions (arithmetic average of three continuous one-hour periods) of sulfur dioxide as measured by a continuous monitoring system exceed the emission level of 1.12 grams of sulfur dioxide per million calorie heat input (0.61 pounds per million BTU).

The owner or operator shall comply with the notification and record keeping requirements specified in 40 CFR 60.7 and with the monitoring requirements specified in 40 CFR 60.13. The written reports of excess emissions shall include average hourly coal feed rates and average daily fuel analysis (as fired) at the time(s) excess emissions are measured by the required continuous monitoring system. Immediate reporting of emissions in excess of this condition may be required if deemed necessary by the Administrator.

c. Sulfur content of coal (as fired) shall not exceed 1%. Fuel analysis shall be in accordance with the following American Society for Testing and Materials methods:

- (1) Mechanical sampling by Method D2234065.
- (2) Sample preparation by Method D2013-65.
- (3) Sample analysis by Method D271-68.

The Company shall maintain records of the fuel analysis for a period of at least two years following the date of such measurements. Fuel analysis shall be done at least once per day. Furthermore, the Company shall record the average hourly coal feed rates to Units 3 and 4 and maintain such records for a period of at least two years following the date of such measurements.

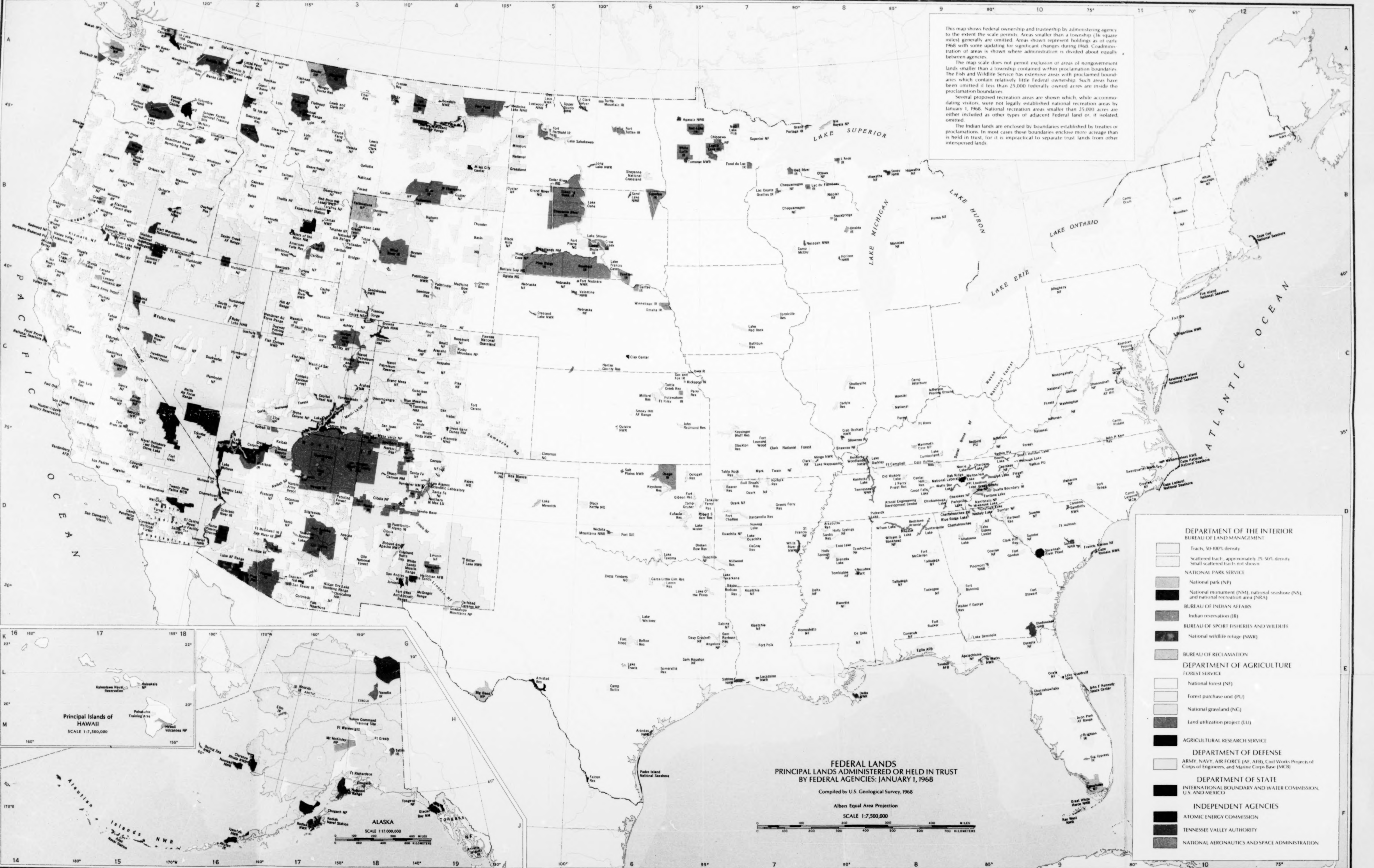
Section 52.21(d) (5) provides that approval of a permit, as proposed hereinabove, cannot be granted until the Agency has acted upon a proposed redesignation to a more stringent class. Once announcement of intention to

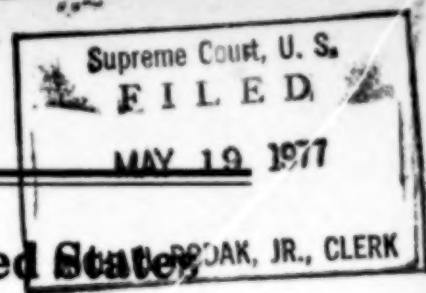
redesignate is received by the Agency, then Section 52.21 (d) (5) mandates the holding in abeyance the approval of pending permit application, such as this, which, if approved would violate the announced Class I increments. It has been determined that the Northern Cheyenne Tribe has announced their intention to redesignate to Class I their reservation, located approximately 15 miles south of the proposed facility. Preliminary modeling results indicated that a Class I increment could be violated on the reservation by the proposed facility. The subject permit application will be processed up to the point of final decision by the Agency, however, a final decision, that is, any approval of the permit (other than an approval based on a determination that the proposed facility will not violate a Class I increment within the boundaries of the reservation) will not occur until the Agency has acted on the proposed redesignation, provided the Northern Cheyenne Tribe pursues said redesignation expeditiously and proposes redesignation to the Administrator within a time-frame that is as expeditious as possible following announcement of their intent to redesignate.

It has come to our attention recently that air quality data from the town of Colstrip indicate that the National Ambient Air Quality Standards for particulate matter were exceeded last year. The Denver Regional Office of the Environmental Protection Agency is investigating the effects of this situation on this proposed action.

Public comments are invited on this and other pertinent matters anytime prior to October 16, 1976. Comments may be directed to the U.S. Environmental Protection Agency, Region VIII, David A. Wagoner, Director Air and Hazardous Materials Division, 1860 Lincoln Street, Denver, Colorado 80203. All comments received prior to October 16, 1976 will be considered in arriving at a final determination on the application. Within 30 days of October 16, 1976, the Administrator shall notify the appli-

cant of the intended final decision based on the current designation. The public comments, response to public comments, and the notification of final decision shall be available for public inspection at the Rosebud County Public Library and the Denver U. S. Environmental Protection Agency Regional Office.





IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-529

MONTANA POWER COMPANY, ET AL., *Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-585

AMERICAN PETROLEUM INSTITUTE, ET AL., *Petitioners*,

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-594

INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL., *Petitioners*,

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No. 76-603

ALABAMA POWER COMPANY, ET AL., *Petitioners*,

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-619

UTAH POWER & LIGHT COMPANY, ET AL., *Petitioners*,

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**BRIEF FOR PETITIONERS
WESTERN ENERGY SUPPLY AND
TRANSMISSION ASSOCIATES
AND
UTAH INTERNATIONAL, INC.**

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BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia is reported at 540 F.2d 1114 and is reproduced in the Joint Appendix at 39a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1976. This Court granted the petitions for writ of certiorari and consolidated the cases on April 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTE AND REGULATIONS INVOLVED

The relevant provisions of the Clean Air Act, as amended, 42 U.S.C. §1857, *et seq.*, are set forth in Appendix A to this Brief. The regulations at issue are set forth in the Joint Appendix at 206a and amendments thereto are set forth in the Joint Appendix at 242a, 246a, 284a.

QUESTIONS PRESENTED¹

1. Whether the Clean Air Act Amendments of 1970, which provide that the Administrator of the Environmental Protection Agency "shall approve" state plans for the implementation of federal air quality standards which enforce such standards within the State, require him to approve such plans, or whether he may approve

¹ The petitioners' statement of the first question presented is identical to the government's statement of the question presented in *Ruckelshaus v. Sierra Club*, No. 72-804, OT 1972, *aff'd per curiam by an equally divided Court, sub nom Fri. v. Sierra Club*, 412 U.S. 541 (1973). The second question presented is taken from the Court's statement of the second question in its order granting certiorari.

only state plans which, in addition, will effectively prevent significant deterioration of existing air quality in any portion of any State.

2. Whether the Clean Air Act permits the Environmental Protection Agency to adopt regulations which grant to federal land managers and Indian governing bodies power to reclassify federal and Indian lands within their jurisdiction.

STATEMENT OF THE CASE

The Clean Air Act Amendments of 1970² carefully spell out the respective roles of the federal and state governments in achieving the legislative objective of air quality control. Federal authority is vested in the Administrator of the Environmental Protection Agency, who is given the responsibility for issuing air quality criteria³ and prescribing national primary and secondary ambient air quality standards for each air pollutant for which air quality criteria have been issued.⁴

² Pub.L. 91-604, 84 Stat 1705, 42 U.S.C. §1857 *et seq.*

³ Section 108, 42 U.S.C. §1857c-3

⁴ National primary ambient air quality standards are defined as "standards the attainment and maintenance of which in the judgment of the Administrator . . . allowing an adequate margin of safety, are requisite to protect the public health . . ." Section 109(b) (1), 42 U.S.C. §1857c-4(b) (1). A secondary standard is defined as "a level of air quality the attainment and maintenance of which in the judgment of the Administrator . . . is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [any air pollutant for which air quality criteria are issued] in the ambient air." *Id.* at subsection (2).

The primary responsibility for implementation of these standards, set by EPA pursuant to statutory direction and authority, is vested in the individual states. The key section is §110,⁵ which provides for the submission by each state of a plan for implementation, maintenance, and enforcement of the primary and secondary standards in each air quality control region within the state. Section 110 further provides that the Administrator must approve or disapprove the state plan within four months after submission and, specifically, that "the Administrator shall approve such plan or any portion thereof if he determines that it was adopted after reasonable notice and hearing" and that eight specific statutory criteria are met. None of these criteria has anything to do with air quality better than the secondary standards.

As discussed in this Court's review of the history of federal air quality legislation reaching back to 1955 in *Train v. Natural Resources Defense Council, Inc.* 421 U.S. 60, 63-67 (1975), the 1970 Amendments clearly expanded the role of the federal government "by taking a stick to the states...."⁶ It is equally clear, however, that "the Amendments explicitly preserved the principle: 'Each state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State....'"⁷ This is demonstrated not only by §107, but also by

⁵ 42 U.S.C. §1857c-5

⁶ 421 U.S. at 64

⁷ *Id.* at 64, citing from §107(a), 42 U.S.C. §1857(a) (3) of the 1970 Amendments to the Clean Air Act.

§101(a) (3),⁸ by §116, which preserves to the states the right to adopt emission standards or limitations or abatement or control requirements more stringent than those provided pursuant to the Act, and by §118, which requires all segments of the federal government to comply with the requirements of the statute including those set by state and local governments.

In short, Congress took a stick to the states not by removing their responsibility for implementation of EPA's air quality standards, but rather by mandating that the states carry out this responsibility.⁹

State plans for implementation of the national primary and secondary standards were initially submitted some five years ago. Following disclosure by the EPA Administrator to Congressional committees¹⁰ that, in his view, the Act required approval of plans that met the eight criteria specified by §110(a) (2), the Sierra Club and others filed suit in the United States District Court for the District of Columbia seeking to enjoin the Administrator from approving any plans that did

⁸ "(a) The Congress finds

* * * * *

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments...." 42 U.S.C. §1857(a) (3).

⁹ In the event of failure of state enforcement, §113 provides for federal enforcement. 42 U.S.C. §1857c-8.

¹⁰ Hearings on Clean Air Act Oversight before the Subcommittee on Public Health and Environment of the House Committee on Interstate and Foreign Commerce, 92d Cong., 2d Sess., ser. 92-105 (1972), at 530-531; Hearings on Implementation of the Clean Air Act Amendments of 1970 before the Subcommittee on Air and Water Pollution of the Senate Public Works Committee, 92d Cong., 2d Sess., ser. 92-H31 (1972), Pt. 1., at 246-249, 271-276.

not prevent significant deterioration of existing air quality. The District Court held that "plaintiffs have made out a claim for relief"¹¹ and issued an injunction. The Court of Appeals affirmed *per curiam*.¹² This Court granted certiorari and, following oral argument, affirmed without opinion by an equally divided Court.¹³

Pursuant to the injunction which was left in effect, the Administrator disapproved the implementation plans of all states insofar as they did not provide for the prevention of significant deterioration¹⁴ and promulgated the regulations at issue here.¹⁵

Central to the second issue before the Court are the provisions of the regulations dealing with area designation and redesignation. The regulations provide for three classifications of all areas that already meet the federal primary and secondary standards for sulphur oxides and particulates. Classes I and II allow only sharply limited incremental increases in existing levels, while Class III is set at the level of the secondary standards. 40 C.F.R. §52.21(c) (2). Class I is to be used for areas in which "practically any change in the air qual-

¹¹ *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253, 256 (D.D.C. 1972)

¹² 4 E.R.C. 1815 (1972)

¹³ *Fri. v. Sierra Club*, 412 U.S. 541 (1973)

¹⁴ 37 Fed. Reg. 23836 (Nov. 9, 1972)

¹⁵ Though bound to obey the Court's order, the Administrator continued to "adhere to the view . . . that the Act does not require EPA or the States to prevent significant deterioration of air quality," and that he was issuing his regulations only because of "the preliminary injunction issued by the District court." 39 Fed. Reg. at 18986 (July 16, 1973), set forth in the Joint Appendix at 91a.

ity would be considered significant"; Class II is for areas where significant would be more than that "normally accompanying moderate well-controlled growth"; and Class III would allow "deterioration of air quality up to the national standards".¹⁶ All areas are initially designated as Class II.¹⁷

The states are given the power to propose redesignation of any area, including federal lands within their borders.¹⁸ This redesignation power is subject to certain notice and hearing requirements¹⁹, including notification to "other States, Indian Governing Bodies, and Federal Land Managers whose lands may be affected . . .".²⁰ The Administrator must approve the redesignation unless he determines that the procedural requirements have not been complied with or that the State arbitrarily and capriciously disregarded specified substantive requirements.²¹

¹⁶ 39 Fed. Reg. 42510

¹⁷ 40 C.F.R. §52.21(c) (3) (1)

¹⁸ Private persons or businesses may not propose redesignations, nor are there any procedures for forcing a state, federal, land manager, or Indian governing body to propose redesignations.

¹⁹ 40 C.F.R. §52.21(c) (3) (ii)

²⁰ 40 C.F.R. §52.21(c)(3) (ii) (b)

²¹ The substantive requirements are contained in 40 C.F.R. §52.21(c) (3) (ii) (d), which provides: "The proposed redesignation is based on the record of the State's hearing, which must reflect the basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the area being proposed for redesignation and upon other areas and

[Continued]

If the Regulations had granted redesignation authority only to the states, they would approach the distribution of authority between state and federal governments set forth in the statute itself. The statute provides for authority in the states to impose substantive requirements more stringent than the secondary standards mandated by Congress.²² Under the regulations, this same result could be achieved by the state's redesignation to Class I or permitting the Class II designation to remain in effect. Or, if the secondary standards represent the state's preferred tradeoff between environmental and economic/energy-saving consequences, it could redesignate to Class III. Thus, if the redesignation authority had been limited to the states, the only inconsistency between the division of federal-state authority prescribed by the statute, and that prescribed by the regulations would be (1) the lack of flexibility from pigeon-holing into three classifications, (2) the standard and scope of EPA's review authority and (3) the notice and hearing requirements.

In fact, the departure from the statute is far more serious because redesignation authority does not rest solely with the states. Similar redesignation authority, subject to similar notice and hearing requirements and substantive review by EPA solely for the purpose of determining arbitrary and capricious disregard of the factors cited in footnote 21, *supra*, is also conferred

States, and (3) any impacts of such proposed redesignation upon regional or national interests." The "arbitrary and capricious" standard of review for State redesignations is contained in 40 C.F.R. §52.21(c) (3) (vi) (a).

²² Section 116, 42 U.S.C. §1857d-1

upon federal land managers²³ and Indian governing bodies.²⁴ Federal land managers may propose redesignate only to a more restrictive designation; that is, from Class II to Class I in the case of lands that the state has not redesignated, or, where the state has redesignated as Class III, the federal land manager could re-redesignate to Class II or Class I. Indian governing bodies may propose redesignation into any class, except in those cases where the state has "assumed jurisdiction over an Indian reservation"²⁵

²³ 40 C.F.R. §52.21(c) (3) (iv). "Federal Land Manager" is defined by the Regulations: "The phrase 'Federal Land Manager' means the head, or his designated representative, of any Department or Agency of the Federal Government which administers federally-owned land, including public domain lands." 40 C.F.R. §52.21(b) (3).

²⁴ 40 C.F.R. §52.21(c) (3) (v). "Indian Governing Body" is defined by the Regulations: "The phrase 'Indian Governing Body' means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government." 40 C.F.R. §52.21(b) (5).

²⁵ 40 C.F.R. §52.21(c) (3) (b). Apparently, the assumption of jurisdiction to which the regulation refers is that which occurs under Public Law 280, 67 Stat. 589, 28 U.S.C. §1360. If the reason for tying redesignation authority to lack of state assumption of jurisdiction under Public Law 280 is to impart some kind of congressional authorization to this scheme, Public Law 280 is not adequate for the purpose. This Court recently clarified in *Bryan v. Itasca County, Minnesota*, 96 S.Ct. 2102 (1976), that that statute had a limited scope insofar as state exercise of power is concerned: "The primary concern of Congress in enacting Pub.L. 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." 96

[Continued]

Either the federal land manager or the Indian governing body, before redesignating, is required to consult with the states in which the federal land or the Indian reservation is located, or which it borders, just as the states are required to give notice to other states, Indian governing bodies, and federal land managers concerning their proposed redesignations. But the authority to redesignate is vested in the federal land managers and Indian governing bodies, and not in the states. This notwithstanding the careful statutory construct which allocates to EPA substantive authority to set primary and secondary air quality standards and to the states both substantive authority to set more stringent standards and primary implementation authority over all standards.

The national primary and secondary standards constitute the limit of EPA's substantive authority to set air quality standards. Section 116 vests in the states the exclusive authority to set substantive air quality standards beyond the primary and secondary standards. This division of substantive and implementing authority between state and federal government is the foundational principle of the Clean Air Act.

S.Ct. at 2107. With regard to civil jurisdiction, the Court observed that the relevant provision of the statute "seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between other Indians and other private citizens, by permitting the courts of the states to decide such disputes" 96 S.Ct. at 2109. In any event, limiting the redesignation authority of Indian governing tribes to those tribes over whom the states have not assumed jurisdiction under Public Law 280 clearly provides no statutory foundation for the regulation. Congress' decisions concerning authority over air quality standards, and the implementation of those standards, is contained in the Clean Air Act, not in Public Law 280.

Very simply, the administrative creation of a redesignation authority in federal land managers and Indian governing bodies reduces this careful statutory construct to a shambles. There is absolutely no statutory basis for such redesignation authorization. It runs squarely counter to the exclusive authority of the states to set standards more strict than those provided by the Act. Moreover, it adds additional layers of governmental review and results in an administrative authority so fragmented among so many entities that it creates enormous practical difficulties.

Thus, in attempting to grant redesignation authority to Indian governing bodies and federal land managers, the Administrator has not only acted outside the scope of his authority, but has attempted to delegate to non-state governmental entities powers which the statute expressly withheld from federal authority and vested in the states.

SUMMARY OF ARGUMENT²⁶

1. This litigation presents the classic example of problems that are encountered when an administrative agency is forced to attempt to devise regulations in implementation of an assumed purpose that is contrary to the statutory language and structure. The Environmental Protection Agency, the administrative agency charged with the enforcement of this statute, and whose views are therefore entitled to great weight

²⁶ For the convenience of the Court, and in the interest of efficiency, these petitioners will summarize their argument concerning the first issue presented, but will not develop that position in the argument portion of the brief; rather, on this issue we will adopt the argument presented by petitioners in these consolidated cases who have addressed that issue.

in matters of interpretation of the statute,²⁷ has consistently, and correctly, taken the position that the statute does not authorize the Administrator to prescribe air quality standards other than the primary and secondary standards expressly referred to by the Act.²⁸

This is also a case in which the legislative history is ambiguous, but the statutory language is very plain. Given the limits of the English language, it would be difficult to express much more clearly the foundational principle that the Administrator sets primary and secondary air quality standards; that each state adopts and submits to the Administrator a plan for the "implementation, maintenance and enforcement" of such standards; and that the Administrator "shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing" and that it meets eight specified statutory criteria, none of which deals with air quality standards other than the primary and secondary standards.

The statute speaks with equal clarity concerning substantive authority to set air quality standards. As to primary and secondary standards, that authority belongs to the federal government and is exercised by the Administrator. But, within the range between the secondary standards and completely uncontaminated

²⁷ *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75 (1975); *Udall v. Tallman*, 380 U.S. 1 (1965).

²⁸ See footnote 15, *supra*. See also the government's brief in *Ruckelshaus v. Sierra Club*, No. 72-804, OT 1972, *aff'd per curiam* by an equally divided Court, *sub nom* *Fri. v. Sierra Club*, 412 U.S. 541 (1973).

air, substantive standard-setting authority belongs to the individual states.²⁹ Enlarging the federal government's substantive authority beyond the authority to set primary and secondary standards effectively eviscerates this additional element of substantive authority which the statute gave to the states, allowing them to adopt substantive standards more stringent than those authorized by the statute.

The statute is explicit. It mandates the setting of primary and secondary standards and vests the authority to set those standards in EPA. More stringent standards may be set, but that decision lies within the authority of the states. Implementation plans for the purpose of carrying out those standards, submitted by the states, must be approved so long as they satisfy eight criteria. Nothing is said of a tertiary standard, or a ninth criterion, and the existence of either would run squarely counter to the language and the structure of the statute. Judicially grafting such a third standard or a ninth criterion onto the explicit language of the statute not only contradicts the plain language of the Act, but also upsets the allocation of authority between federal and state government by transferring to EPA the authority which §116 of the Act expressly grants to the states: the right to make the tradeoff judgments balancing environmental against nonenvironmental considerations, so long as the secondary standards are observed. It is significant that even EPA, the beneficiary of this increased authority, agrees that it is inconsistent with the Act.³⁰

²⁹ Section 116, 42 U.S.C. §1857d-1

³⁰ In its brief before this court in *Ruckelshaus v. Sierra Club*, the government stated: "The holding of the courts below is, we sub-

This Court has interpreted the 1970 Amendments to the Clean Air Act on three occasions. Every one of those opinions, *Union Electric Co. v. EPA*, 427 U.S. 246 (1976); *Hancock v. Train*, 426 U.S. 167 (1976); and *Train v. Natural Resources Defense Council, Inc.* 421 U.S. 60 (1975), reaffirms that the statute meant what it said when it required the Administrator to approve state implementation plans that meet the eight criteria. While it is true that those cases did not involve the precise issue in this case, all three addressed the "shall approve" requirement of §110 in language that controls this case. The Court in *Hancock* stated, "The EPA was required to approve each State's implementation plan as long as it was adopted after public hearings and satisfied the conditions specified in §110(a) (2)."³¹

Similarly, in *Train v. NRDC*, the Court ruled that:

"Under §110(a) (2) the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of §110(a) (2)"³²

mit, inconsistent with the careful statutory balance drawn by Congress between federal and state responsibilities, and, if permitted to stand, would substantially impair the prompt and effective implementation of the Clean Air Act Amendments of 1970". Government's Brief, *Ruckelshaus v. Sierra Club*, No. 72-804, OT 1972 pp. 5-6.

³¹ 426 U.S. at 170-171

³² 421 U.S. at 79 (Emphasis in the original).

And in *Union Electric*:

"This approach is apparent on the face of §110(a) (2). The provision sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator 'shall approve' the proposed state plan. The mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified."³³

The Act's statement of purpose to "protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population"³⁴ is the sole asserted statutory authority for the lower court's holding. That statement of purpose is not self-fulfilling. Rather than inferring some assumed implementation of this general objective, consideration must be focused on what Congress actually did to provide for "protection and enhancement". What Congress did is not to be found in some imagined, though unexpressed, emanations from §101, but from the operative provisions of the Act.

Congress provided for the "protection" or maintenance of existing air quality—including air quality already better than that provided by the secondary standards—through two sections of the Act, §111 and §116. Section 111 grants authority to EPA to set performance standards for new and existing stationary sources³⁵ and further provides for the enforcement of

³³ 427 U.S. at 257

³⁴ Section 101(b) (1). 42 U.S.C. §1857(b) (1).

³⁵ Section 111, 42 U.S.C. §1857c-6.

such standards. The legislative history consistently emphasized that this provision was designed to prevent or minimize deterioration of existing air quality.³⁶

Additional "protection" for existing clean air areas is provided by §116, which permits the states to adopt air quality standards more stringent than provided by the Act. On its face, §116 necessarily rejects the notion that all substantive air quality standard authority

³⁶ The President, who first proposed such a scheme, said that it would insure "that levels of air quality are maintained in the face of industrial expansion." 116 Cong.Rec. 32910 (1970). The House Committee observed that it would "prevent the occurrence anywhere in the United States of significant new air pollution problems" H.Rep. No. 91-1146, 91st Cong., 2d Sess. (1970), at 3. On the Senate side, the Committee reported that "[m]aintenance of existing high air quality is assured through provision for maximum control of new major pollution sources." S.Rep. No. 91-1196, 91st Cong., 2d Sess. (1970), at 2. It was in advocacy of new source performance standards that Senator Muskie contended: "While we clean up existing pollution, we must also guard against new problems. Those areas which have levels of air quality which are better than the national standards should not find their air quality degraded by the construction of new sources." 116 Cong.Rec. 32902 (1970). Senator Randolph, Chairman of the Public Works Committee, urged the Senate to adopt the Conference Report, including "performance standards for new stationary sources, to make sure that no industrial development will degrade the quality of the air so as to endanger public health and welfare, or interfere with or restrain further economic growth." *Id.* at 42392. And Senator Dole observed that "Under this bill, we can continue to encourage the location of new industry in Kansas and other rural unspoiled regions without fear of polluting the high quality of air found there. At the same time, national standards for new stationary sources will not place some states at a comparative disadvantage affecting industry decisions on plant locations." *Id.* at 32923.

would be vested in the federal government. Very simply, if the lower court's judgment is upheld, there will be no range of air quality choices within which the states' statutory authority to adopt standards more stringent than provided by the Act can operate.

Thus, Congress provided for the "protection" of existing air quality through §111 and §116, not through §110. The command of §110 is clear: implementation plans which satisfy the eight criteria must be approved.

The Court of Appeals also placed great emphasis on the legislative history, particularly a passage in the Senate Report stating that "where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality".³⁷ This and other samples of legislative history fail to sustain the lower court's holding for several reasons.

First, since the statutory language is clear, there is no need to resort to legislative history. *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617 (1944); *Malat v. Riddell*, 383 U.S. 569, 571 (1966); *United States v. Missouri Pac. R. Co.*, 278 U.S. 269 (1929). The excerpt from the Senate Report consists of a single sentence from a 129 page report. It is not found either in the House Report or the Conference Report. There are other pieces of legislative history upon which the lower court relied, but as noted

³⁷ S.Rep. No. 91-1196, 91st Cong., 2d Sess. 11 (1970)

above,³⁸ there are equally persuasive segments of legislative history that favor the petitioners' position. There is no such ambiguity in the language of the statute. This case is therefore a classic illustration of the well-settled rule that where the statutory language is clear, there is no need to resort to legislative history.

Second, the provisions of the legislative history on which the lower court relied are no more self-fulfilling than is the "protect and enhance" language of §101. What Congress did to insure that implementation plans provide "to the maximum extent practicable, for the continued maintenance of such ambient air quality" is found not in some inference from the legislative history, but in the operative provisions of the statute. "The continued maintenance of . . . air quality" already cleaner than the secondary standards is provided by §111, dealing with stationary source controls, and by §116, which authorizes the states to adopt more stringent standards.

Thus, the content of the generalized "protect and enhance" objective, as well as the fulfillment of the snippets of legislative history relied on by the lower court can be found only in the specific provisions of the Clean Air Act.

2. The Court of Appeals held that the issue of the Administrator's statutory authority to grant redesignation authority to federal land managers and Indian governing bodies is not ripe for adjudication. The Court of Appeals erred in this holding.

EPA promulgated these regulations as identical implementation plans for each state. If the holdings of

four Circuit Courts of Appeal and numerous district courts concerning the exclusivity of §307 of the Clean Air Act as a means of review of implementation plans is correct, then it is not only appropriate to review all aspects of the Administrator's regulations at this time, but such review at any other time would be foreclosed. The Court need not even reach the issue whether §307 provides the exclusive means for review of state implementation plans, however, because under general principles dealing with ripeness of federal regulations for judicial review this case is clearly ripe. The issue presented is purely legal. The agency action is final within this Court's decisions on that issue. Most important of all, the regulations will have a "direct and immediate impact" not only on the parties to this litigation, but also on important national interests.

On the merits of the second question, Congress has provided careful and detailed divisions of authority and responsibility between federal and state governments, with substantive authority in the Administrator to set primary and secondary air quality standards, substantive authority in the states to set air quality standards more stringent than the secondary standards, and authority in the states for the implementation, maintenance, and enforcement of the substantive standards.

The foundation stones of this carefully fitted federal-state structure have been abruptly removed by the Administrator's creation of a redesignation authority in federal land managers and Indian governing bodies. This has been accomplished without any statutory authority and, indeed, contrary to several statutory provisions.

³⁸ See footnote 36.

The practical implications of this administrative rearrangement of the statute are as important as its theoretical ones. The principal impact of the significant deterioration regulations will be in the western United States. This is also an area of the country that consists of a checkerboard of federal, Indian, state, and private land. The Administrator has correctly observed that redesignation as Class I could effectively control growth and development not only within the redesignated area, but also within a distance of sixty to one hundred miles of that area. Vesting redesignation authority in federal land managers and Indian governing bodies will deprive the states of their statutorily conferred rights to make choices concerning trade-offs between air quality on the one hand and energy conservation and economic considerations on the other. Because of the 60-100 mile overreach, this deprivation will apply to virtually all of the eleven western states, including lands that are neither federal nor Indian.

ARGUMENT

1. *Ripeness of Redesignation Issue*

Interests and policies that are of immediate importance not only to these parties, but also to the nation as a whole, require that this second issue on which the Court granted certiorari³⁹ be decided at this time.

³⁹ The Court's characterization of the second question as to which certiorari was granted as set forth in the Questions Presented, *supra*, p. 2, might imply that the Court agrees that ripeness is not an issue in this case. Because ripeness was the basis for the lower court's judgment on the redesignation issue, however, we will treat it briefly.

The Clean Air Act contains its own judicial review procedures. Under §307(b)(1)⁴⁰ petitions for review of certain actions of the Administrator—including approval or promulgation of implementation plans—must be filed within 30 days from the date of promulgation or approval. Four Circuit Courts of Appeal, the Third, Seventh, Ninth, and Tenth, as well as numerous federal district courts, have held that §307 is the exclusive means by which implementation plans may be reviewed.⁴¹ The regulations here at issue were promulgated under §110c-5(c)⁴² as identical implementation plans for each state to prevent significant deterioration of air quality. The consolidated cases before the Court were originally filed as petitions for review under §307. Under the holdings of the cases cited above, therefore, judicial review of these regulations at this time is more than appropriate; if these regulations are to be reviewed at all, it must be in an action filed under §307 within thirty days of their promulgation.

⁴⁰ 42 U.S.C. 1857h-5(b) (1)

⁴¹ *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975); *Getty Oil Company (Eastern Operations) v. Ruckelshaus*, 467 F.2d 349, 355-56 (3d Cir. 1972), *cert. denied* 409 U.S. 1125 (1973); *Plan for Arcadia, Inc. v. Anita Associates*, 501 F.2d 390, 392 (9th Cir. 1974), *cert. denied*, 419 U.S. 1034 (1974); *Utah Internat'l, Inc. v. EPA*, 478 F.2d 126, 128 (10th Cir. 1973); *Anaconda Company v. Ruckelshaus*, 482 F.2d 1301, 1304 (10th Cir. 1973); *Pinkney v. Ohio Environmental Protection Agency*, 375 F.Supp. 305, 309 (N.D. Ohio 1974); *Arizona Public Service Company v. Fri*, 5 E R C 1878 (D. Ariz. 1973); *Hagedorn v. Union Carbide Corporation*, 363 F. Supp. 1061, 1068 (N.D. W.Va. 1973); *Delaware Cit. For Clean Air, Inc. v. Stauffer Chem. Co.*, 367 F. Supp. 1040, 1046 (D. Del. 1973), *aff'd* 510 F.2d 969 (3d Cir. 1975).

⁴² 42 U.S.C. §1857c-5 (c)

This case may not be the most appropriate vehicle for ruling on the exclusivity of §307 as a means of judicial review of implementation plans. Fortunately, that issue need not be resolved in this case because, under general principles of ripeness applicable to judicial review of federal regulations, review of these regulations is clearly appropriate at this time.⁴³

The rules dealing generally with the ripeness of federal regulations for judicial review are illustrated by three cases decided the same day, all involving regulations of the Food and Drug Administration. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Toilet Goods Association v. Gardner*, 387 U.S. 158 (1967); and *Gardner v. Toilet Goods Association*, 387 U.S. 167 (1967). The underlying rationale and the two-fold test for ripeness were summarized by the *Abbott Laboratories* opinion:

“Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its

⁴³ It should be noted, however, that if the Court should disagree with petitioners' view concerning the general rules dealing with ripeness, then the question whether §307 provides the exclusive means for review of state implementation plans (and the apparent conflict between the District of Columbia Circuit and the Third, Seventh, Ninth, and Tenth Circuits on this issue) would have to be decided in this case, because if those circuits which hold that review under §307 within thirty days of promulgation is correct, then this case is not only *an appropriate time* to review the regulations, it is *the only time* that such review can be had.

effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.”⁴⁴

The Court held that two of the cases, *Abbott Laboratories* and *Gardner v. Toilet Goods Association*, were ripe for adjudication, but that the third, *Toilet Goods Association v. Gardner* (on which the Court of Appeals relied) was not ripe. Analysis of those three opinions compels the conclusion that the second issue in this case should be decided by this Court at this time.

In the instant case, as in all three of the FDA cases, the issue is purely legal. It is also, we submit, an issue as to which the agency action is final within the holdings of this Court in the FDA cases and also *Frozen Food Express v. United States*, 351 U.S. 40 (1956); and *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). The finality concern appears to be the basis for the Court of Appeals judgment on this issue, that Court observing that, “if the Administrator were to approve, as replacements for these regulations, individual state plans which did not include the powers granted the federal land managers and Indian governing bodies, the problems foreseen by petitioners might never arise.” Joint Appendix 87a. With all due respect, this amounts to nothing more than an assertion that the Administrator might reverse his position. These regulations have been officially promulgated. They grant to federal land managers and Indian governing bodies the powers whose legality is the substantive

⁴⁴ 387 U.S. at 148-49

issue in this case. There is no indication, either in this record or anywhere else, that the Administrator did not mean to do what he did in these regulations, or that he now intends to change his mind, or that such a change would escape challenge.

Even more important, the three FDA opinions clearly reveal that the controlling factor distinguishing *Abbott Laboratories* and *Gardner v. Toilet Goods Association*—which were held to be ripe—from *Toilet Goods Association v. Gardner*—which was not—was “the degree and nature of the regulation’s present effect on those seeking relief”.⁴⁵ The regulation at issue in *Toilet Goods Association v. Gardner*, the unripe case, provided for suspension of certification service to any firm that refused to permit FDA employees certain access to that firm’s facilities, processes, and formulae. The Court in that case observed: “This is not a situation in which primary conduct is affected—when contracts must be negotiated, ingredients tested and substituted, or special records compiled.”⁴⁶

By contrast, the regulation in *Abbott Laboratories*, requiring drug companies to print on the label the established name of certain drugs every time the proprietary name was employed, had a “sufficiently direct and immediate [impact] as to render the issue appropriate for judicial review at this stage.” 387 U.S. at 152. This “sufficiently direct and immediate impact” was explained by the Court:

“If petitioners wish to comply they must change all their labels, advertisements, and promotional

⁴⁵ *Toilet Goods Association v. Gardner*, 387 U.S. 158 at 164

⁴⁶ 387 U.S. at 164

materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies.”⁴⁷

Similarly, *Gardner v. Toilet Goods Association*, involved, *inter alia*, a so-called “patch test” exemption from the statutory color additive provisions. The Toilet Goods Association contended that the Administrator had exceeded his statutory authority in restricting the patch test exemption. The issue was ripe for review because:

“... [I]t is quite clear that if respondents, failing judicial review at this stage, elect to comply with the regulations and await ultimate judicial determination of the validity of them in subsequent litigation, the amount of preliminary paper work, scientific testing, and recordkeeping will be substantial.”⁴⁸

The rule that emerges from analysis of the three FDA cases is quite clear: the free access regulations in the unripe case, *Toilet Goods Association v. Gardner*, did not affect “primary conduct” such as the negotiation of contracts, the testing or substitution of ingredients, or the compilation of special records. The other two cases did require “primary conduct.” In the one case, labels and promotional materials would have to be changed, and in the other, substantial amounts of paperwork, scientific testing, and recordkeeping would be implicated.

The conduct necessitated by the FDA regulations in *Abbott Laboratories* and *Gardner v. Toilet Goods* is pale by comparison to this case. The unlawful grant of

⁴⁷ 387 U.S. at 152

⁴⁸ 387 U.S. at 173

authority to Indian governing bodies and federal land managers has created a veto power over energy development, especially in the western United States served by these petitioners. It also creates the potential for abuse of such power by an entity that proposes a redesignation for purposes other than the merits of the proposal, e.g. to exert leverage over a private company or a nearby governmental entity. EPA itself recognizes the potential for this kind of abuse.⁴⁹

The very existence of that veto power has a concrete, impeding impact on planning, investment, and development for meeting energy needs.⁵⁰ The dollar value of that impact is many times greater than was involved in the labels, advertisements, printing type and supplies in the FDA cases. These petitioners have existing plants, plants under construction, and plants

⁴⁹ A "Guidance Memorandum" on the regulations from the Assistant Administrator of EPA to all Regional Administrators dated September 18, 1976, reveals the pervasive impact of the federal and Indian authority. The full text of the Memorandum appears in 7 BNA Env. Rptr., No. 23, at 859 (Oct. 8, 1976), and is reproduced in pertinent part as Appendix B of this brief. The discussion of potential abuse of redesignation authority appears at pp. 3b-4b of Appendix B.

⁵⁰ The Northern Cheyenne Indian Tribe recently proposed redesignation of its reservation in Montana as a Class I area. On April 29, 1977, EPA published its proposed approval of the redesignation and solicited comments on whether the Tribe had satisfied two procedural criteria. (42 Fed Reg. 21819) The proposed action is supported by both the Department of the Interior and the state of Montana. However, the redesignation is opposed by the neighboring state of Wyoming, the Crow Indian Tribal Council, whose reservation borders on the Cheyenne's, and the

[Continued]

in the planning stages. Planning for all of these facilities, including assurance of adequate coal supplies, cannot proceed properly, pending resolution of the conflicting jurisdictions of the states, Indian tribes and various federal agencies. Site selection and planning for electric generation plants involves years of effort and many millions of dollars. Petitioners cannot risk such expenditures of time and money on planning and preparing a plant site only to have the site or its fuel source eliminated by redesignation by an Indian tribe or manager of federal lands sixty to one hundred miles distant from the site.⁵¹

Even more serious — and immediately pressing — is the import of this issue to national policy. In his address to a joint session of Congress on April 20, 1977, the President has reminded us that the current energy problems constitute "the greatest domestic challenge

Montana Power Company, a petitioner in this action. The Crow Indians oppose the redesignation because it would limit their options for developing their own coal deposits; Montana Power Company opposes the redesignation because it would block construction of two power plants planned for the area; the State of Wyoming opposes the redesignation because it would effectively limit the development of northern Wyoming by determinations of the Tribe, Montana and the federal government, when such growth determinations belong to Wyoming as a matter of constitutional right.

⁵¹ In the Guidance Memorandum, cited in footnote 49, the Administrator directed that, even where a governing body merely "announces consideration" of a possible reclassification, EPA approval of a *previously* filed application for a construction permit must be withheld pending (and depending upon) EPA action on the reclassification; and this is true even where the proposed source is not to be constructed within the political boundaries of the body considering reclassification.

our nation will face in our lifetime.”⁵² He has also challenged the Congress and the American people that “our plan and our goals for 1985” include a goal “to increase our coal production by more than two-thirds, to over one billion tons a year.”⁵³ Among the significant contexts in which increased use of coal can relieve our dependence on petroleum products are electric generation, coal gasification, and coal liquification. The lead time for that kind of conversion — to whatever extent it is to occur — is measured in years.

This and other aspects of the President’s energy message pose difficult policy decisions, necessarily implicating not only energy but also environmental issues and the inter-relationships between them. These are decisions facing two of the branches of our government, Congress and the President, pursuant to their joint constitutional responsibility to make law. But, in that kind of setting, with many billions of dollars and the welfare of future generations at stake, the occasion is hardly appropriate for the third coordinate branch to decline to function in its assigned constitutional role: the interpretation of already existing federal statutes.

2. *Legality of Redesignation Authority in Federal Land Managers and Indian Governing Bodies*

Throughout the 1970 Amendments to the Clean Air Act, Congress gave rather specific content to the general finding in §101, “that the prevention and control

⁵² Press Release, Text of an Address by the President to a Joint Session of Congress on Energy, April 20, 1977, p. 1.

⁵³ *Ibid.*

of air pollution at its source is the primary responsibility of states and local governments”.

Section 107(a)⁵⁴ provides:

“Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality region in such State.”

The submission and adoption of implementation plans referred to by §107 are treated with greater detail in §110⁵⁵ which provides that “Each State shall . . . adopt and submit to the Administrator . . . a plan which provides for implementation, maintenance, and enforcement . . .” of the national primary and secondary ambient air quality standards set by the Administrator. Section 110 further provides that “the Administrator shall approve such plan or any portion thereof, if he determines that it was adopted after a reasonable notice and hearing . . .” and that it meets eight specified criteria. The eight criteria deal with attainment of the national and primary standards, but make no mention of air quality standards other than the primary and secondary standards.

The general statutory scheme is to vest substantive standard setting authority in the federal government, specifically EPA, and the implementation, maintenance, and enforcement authority in the states. There is one departure from this general pattern: the states

⁵⁴ 42 U.S.C. §1857c-2

⁵⁵ 42 U.S. §1857c-5

are given substantive authority to adopt air quality standards, or emissions limitations, (or control or abatement requirements) more stringent than required by the Act.⁵⁶ The purpose of this provision is clear. Up to the level of the secondary standards, the states are given no choice. Congress mandated the attainment of that level of air quality within the time limits set by the Act, through the medium of state implementation plans. Throughout the Nation, air quality represented by the secondary standards was not optional, but mandatory.

Up to the air quality level represented by the secondary standards, then, the states have no option. But within that incremental range between the secondary standards and air which is pollution-free, the Act gives states the leeway to make their own policy choices concerning the tradeoffs between air quality on the one hand and, on the other, economic development, energy conservation through greater use of coal, and similar considerations. Such issues are among the most difficult and the most important facing governments at all levels. Section 116 of the Clean Air Act did not attempt to answer all of these questions. It did answer some: to the level of the secondary standards, economic considerations, energy conservation considerations, or any other considerations — no matter how weighty — are not to be balanced against considerations of air quality control. Up to that level, Congress has already made the balance. But within the range beyond the secondary standards, the issue is not a closed one. Within this dynamic area involving public policy issues of the greatest possible magnitude,

⁵⁶ Section 116, 42 U.S.C. §1857d-1

Congress has left the policy options open, for each state to exercise, according to its own particular needs.

Finally, §118 of the Act⁵⁷ provides that "each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government ..." shall comply with "Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." This necessarily means that all components of the federal government are subject to the states' substantive authority to set standards more strict than the secondary standards, and also subject to state powers of implementation, maintenance, and enforcement, pursuant to approved implementation plans. In *Hancock v. Train*, 426 U.S. 167 (1976), this Court held that EPA is not required to obtain permits from the State of Kentucky, as provided in that State's implementation plan. But the Court made it very clear that all federal entities are required to conform to state air pollution standards, limitations, and compliance schedules. In the language of the Court:

"The parties rightly agree that §118 obligates federal installations to conform to state air pollution standards or limitations and compliance schedules. With the enactment of the Amendments in 1970 came the end of the era in which it was enough for federal facilities to volunteer their cooperation with federal and state officials."⁵⁸

⁵⁷ 42 U.S.C. §1857f

⁵⁸ 426 U.S. at 181

The Clean Air Act grants authority to two governmental groups: The Environmental Protection Agency, and state and local governments. No other authority is granted. No other authority is intended. And it would be inconsistent with the structure of the statute for any other authority to be created. The reason is that the statute itself allocates all substantive authority so that none is left to allocate. Standard setting authority to the secondary level is in the federal government. Standard setting authority beyond the secondary level is in the states.

Subdivisions iv and v of §3 of §52.21 of the Administrator's regulations, purporting to vest reclassification authority in federal land managers and Indian governing bodies, amounts to nothing less than removal of the foundation stones from the statutory structure allocating substantive and enforcement authority between federal and state governments. There is virtually no aspect of the statutory allocation that is left untouched. Wholly aside from the legality, as a general matter of delegation doctrine of one administrative agency redelegating statutory authority to another, the controlling fact is that, in this case, such redelegation amounts to nothing less than re-writing the statute.

There is no language in the Act which, either expressly or by implication, allows the special treatment of federal and Indian lands within a State. But, in withdrawing reclassification of lands from state control, these regulations affect not only those federal and Indian lands themselves, but neighboring state and private lands as well. This is because the construction or modification of a source covered by the regulations will not be permitted if the effect of that source on air

quality concentrations will cause a violation either of the air quality increments applicable in the immediate area or the increments applicable in any other areas.⁵⁹ EPA itself has emphasized the dramatic effect of this provision:

"Calculations have shown that because of the small air quality increments specified for Class I areas, these levels can be violated by a source located many miles inside an adjacent Class II or III area. For example, a power plant which just meets the Class II increment for SO₂ could under some conditions violate the Class I increment for SO₂ 60 or more miles away. . . . Therefore, wherever a Class I area adjoins a Class II or III area, the potential growth restrictions, especially for power plant development, extend well beyond the Class I boundaries into the adjacent area. A similar situation exists, to a greater or lesser degree, wherever areas of different classification adjoin each other. . . . [I]t should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment."⁶⁰

EPA acknowledged that this "drift factor" could limit growth outside a Class I area as much as 60 to 100 miles.⁶¹ The reclassification of federal or Indian lands can dictate growth and development on adjacent state and private lands for many miles around.

⁵⁹ 40 C.F.R. §52.21(d) (2) (i)

⁶⁰ 39 Fed. Reg. 42512 (Dec. 5, 1974), set forth in the Joint Appendix at 218a, 19a.

⁶¹ *Id.* at 42513, Joint Appendix at 220a

By allowing federal and Indian lands to be reclassified independently of state control, the regulations treat those lands differently from all other lands in the states and grant to federal land managers and Indian governing bodies a decision-making power equal to that of the states themselves. It is in fact a power that supersedes and supplants the power that the statute grants to the states.

Insofar as the prevention of significant deterioration is concerned, there is nothing inherent in the nature of air quality above federal or Indian lands which *per se* should remove its protection from state control. Even if there were, that judgment has been made by Congress; it was not left to EPA. Section 118 explicitly provides that federal lands and entities shall be subject to the same state and other requirements as other persons within the state. Similarly, with regard to Indian lands and entities, it is well settled that "general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary. . . ."⁶² Since the Clean Air Act contains no special provisions for Indian tribes, they are subject to all the provisions of the Act, including those granting the states the responsibility and authority, subject to EPA's supervision, for implementing the Act within their borders.⁶³

⁶² *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960)

⁶³ Several petitioners below argued that the regulations in question violated rights of due process under the United States Constitution. The allocation of the responsibility for reclassification of Indian lands by Indian governing bodies and the "reach" of such reclassifications beyond the Indian land borders certainly

[Continued]

In short, by granting federal land managers and Indian governing bodies a decision-making power separate from that of the states, EPA has purported to grant authority which the Act does not give it to grant. It has also attempted to confer that authority on political entities whom the Act did not intend to have such authority.

EPA's explanatory comment suggests that creating this redesignation authority "ensures that national forests and parks can be protected by the federal government from deterioration of air quality."⁶⁴ Whatever the merits of that argument as a policy matter, it should be addressed to Congress. Congress has already decided that issue, and only Congress can change what it has done. The primary responsibility for assuring air quality within "the entire geographic area comprising such state" was conferred on each state by §107(a) of the Act, and §118 further declared that each segment of the federal government must comply with state standards. Any doubt on that subject was dispelled by *Hancock v. Train*, 426 U.S. 167, 181 (1976), wherein this Court observed, "The parties

raise due process type issues. While petitioners could seek judicial review of a federal land manager's actions or that of a state in federal or state courts, respectively, there is no judicial forum in which to review the Indian governing body action. Judicial review of the actions of Indian tribes under these regulations would only be available in the narrow sense of seeking review of EPA's approval of any designation under the "arbitrary and capricious" standard. The Court did not grant certiorari on the due process issue. Nevertheless, the adequacy of available review procedures is relevant to the legality of the redesignation regulations. *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

⁶⁴ Joint Appendix, at 222a

rightly agree that §118 obligates federal installations to conform to state air pollution standards or limitations and compliance schedules."

The power granted federal agencies and Indian governing bodies creates particularly severe problems in the eleven western states served by petitioners because of the extensive amounts of federal and Indian lands and checkerboard land ownership patterns in those states.

This fact is poignantly demonstrated by the Northern Cheyenne Indian Reservation redesignation, discussed in footnote 50, *supra*, and graphically illustrated by the United States Geological Survey Map appended to this Brief, showing federal land ownership within the United States. Analysis of that map discloses that, except for portions of northeastern Colorado and northeastern New Mexico, there is no place in the eleven western United States that is located sixty miles from Federal or Indian Reservation land. Extending the range to one hundred miles leaves unaffected no part of the State of New Mexico and, in Colorado, only a tiny triangle (measuring about eight miles to the side) along the Kansas border. Indeed, within the vast area south of a line that runs from the Montana-Wyoming border to the Columbia River, east of the Sierra Nevadas, north of the Mexican border, and west of the Rockies' eastern slope, there is no spot that is as much as twenty miles from Federal or Indian reservation land. Thus, within the eleven western states — the area in which these regulations will have their principal impact — the statutory authority of the states to set their own substantive standards so long as they meet the primary and secondary standards has been forfeited by regulatory fiat.

Several of petitioners' electric generating plants and coal mining operations are located in the Four Corners Area of Arizona, Utah, Colorado and New Mexico. Within 60 to 100 miles of the existing and proposed plants within the New Mexico portion of the Four Corners region there are four Indian reservations, two national monuments, three national forests, thousands of acres of federal public domain, as well as three other states.⁶⁵ The delegated authority to New Mexico to redesignate becomes of little value under these circumstances, since one of the considerations is the effects of the proposed redesignations on adjoining areas which include differing Indian governing bodies and differing federal land managers, each having the power of reclassification.

A protest by any one of the multiple federal land managers of Indian governing bodies limits the circumstances under which EPA can approve the reclassification. Moreover, each can initiate its own reclassification, though the federal agencies only to a more restrictive class. This hodgepodge of conflicting "sovereigns" utterly ignores the primary role for the state in which the sources are geographically situated, and instead creates a maze of potential vetoes for en-

⁶⁵ According to the Energy Committee of the New Mexico Legislature 1976, a "recent study on the northwest coal fields in New Mexico conducted by the State Geologist showed that coal ownership was 57.3 percent federal, 32 percent Indian, 5.9 percent private and 4.8 percent state." See also Southwest Energy Study, Department of the Interior, April, 1972 at pp. 3-1 to 3-5, which shows the division of ownership of coal in the five southwestern states [Wyoming, Utah, Colorado, Arizona, New Mexico] to be as follows: 45 percent federal, 13 percent Indian, 17 percent private, 13 percent state, 12 percent railroads.

ergy development that inhibits, if not curtails, petitioners' plans to meet the near and long-term energy crisis.

It is not a sufficient answer that the redesignation regulations give the states most of the authority that they were given by the Act (and that EPA agrees they were given by the Act), i.e., authority to determine for themselves the air quality within their own boundaries, so long as it is at least as clean as required by the secondary standards. The reason that this answer is insufficient is because it is incorrect. If the regulations had granted redesignation authority solely to the states, they would have substantially replicated the division of substantive authority between federal and state governments provided by the statute. That is, the federal government, through EPA, would set the primary and secondary standards but, beyond the secondary standards, substantive authority would be vested in the states. States electing standards higher than the secondary standards could either redesignate to Class I, or permit the Class II designation to remain. Those who preferred the secondary standards could redesignate to Class III. In fact, the regulations do not grant redesignation authority only to the states. Instead, they create a veto power in federal land managers and Indian governing bodies. It is a veto power which, because of the "drift factor" and the checkerboard pattern of land ownership within the western United States, gives these federal land managers and Indian governing boards exactly what the statute gave to the states: the authority to determine whether, and to what extent, air quality will be better than that provided by the secondary standards.⁶⁶

⁶⁶ See footnote 50.

Neither is it a sufficient answer that the regulations require federal land managers and Indian governing bodies to "consult" with the states in connection with redesignations, and that the redesignations are subject to EPA review. Manifestly, the right of consultation is not equal to the right of decision. What the statute has given, the regulations have taken away.

Review by EPA does not save the illegality. The standard of review is to determine arbitrariness and capriciousness. Even more important, EPA's authority to review a redelegation that it had no authority to make in the first place is hardly an adequate bootstrap for the creation of such authority.

The short of the matter is that EPA has attempted, under the guise of redesignation, to transfer to non-state entities authority that the statute granted to the states. No amount of consultation nor review to determine arbitrariness and capriciousness can cure that defect.

CONCLUSION

A single principle resolves both issues in this case.

That principle is judicial fidelity to the language of the statute. The legislative history offers something for both sides of the non-degradation issue, but there is no ambiguity in the statutory language. "Shall approve" means "shall approve" and three times this Court has said that the language of §110 precludes consideration of any factors other than those specified.

If EPA had not been enjoined from implementing the Clean Air Act as EPA interprets the Clean Air Act, the redesignation issue would never have arisen. Also, if redesignation authority had been granted only to the states, then redesignation would have substantially reinstated what the Act originally granted: authority in the states to control the extent to which air quality will exceed the secondary standards.

The solution, of course, is to return to the original statutory construct: (1) substantive authority and responsibility in EPA to set primary and secondary air quality standards, (2) substantive authority in the states to set other air quality standards, and (3) authority and responsibility in the states for the implementation, maintenance, and enforcement of the standards.

The judgment of the Court of Appeals for the District of Columbia must therefore be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

Relevant excerpts from the Clean Air Act, as amended, 42 U.S.C. § 1857 *et seq.*, are as follows:

§ 1857. [§ 101.] Congressional findings; purposes of subchapter

(a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extends into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

* * * *

§ 1857c—2. [§ 107.] Air quality control regions—Responsibility of State for air quality; submission of implementation plan

(a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

* * * *

§ 1857d—1. [§ 116.] Retention of State authority

Except as otherwise provided in sections 1857c—10(c), (e), and (f), 1857f—6a, 1857f—6c(c)(4), and 1857f—11 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or

limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 1857c—6 or section 1857c—7 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

* * * *

§ 1857f. [§ 118.] Control and abatement of air pollution from Federal facilities; compliance of Federal departments, etc., with Federal, State, interstate, and local requirements; exemption by President of any emission source from any executive branch department, etc.; report to Congress

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the

United States to do so, except that no exemption may be granted from section 1857c—6 of this title, and an exemption from section 1857c—7 of this title may be granted only in accordance with section 1857c—7 (c) of this title. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

* * * *

§ 1857h—2. [§ 304.] Citizen suits—Establishment of right to bring suit

(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

* * * *

Non-restriction of other rights

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

* * * *

§ 1857h—5. [§ 307.] Administrative proceedings and judicial review

* * * *

(b) (1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c—7 of this title, any standard of performance under section 1857c—6 of this title, any standard under section 1857f—1 of this title (other than a standard required to be prescribed under section 1857f—1(b) (1) of this title), any determination

under section 1857f—1(b) (5) of this title, any control or prohibition under section 1857f—6c of this title, or any standard under section 1857f—9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c—5 of this title or section 1857c—6(d) of this title may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

APPENDIX B

The following Memorandum appears in 7 BNA Environmental Reporter, No. 23, at 859 (Oct. 8, 1976).

ENVIRONMENTAL PROTECTION AGENCY GUIDANCE MEMORANDUM ON SIGNIFICANT DETERIORATION REGULATIONS — DATED SEPTEMBER 28, 1976.

SUBJECT: Additional Guidance on Prevention of
Significant Deterioration (PSD) Reg-
ulations

FROM: Roger Strelow
Assistant Administrator
for Air and Waste Management (AW-
443).

MEMO TO: Regional Administrators

Questions arising from the Regions have indicated the need for further headquarters guidance on various aspects of the PSD regulation (40 CFR 52.21).

A. Several questions relate to 40 CFR 52.21 (d) (5), which reads as follows:

(5) Where an owner or operator has applied for permission to construct or modify pursuant to this paragraph and the proposed source would be located in an area which has been proposed for redesignation to a more stringent class (or the State, Indian Governing Body, or Federal Land Manager has announced such consideration), approval shall not be granted until the Administrator has acted on the proposed redesignation.

The purpose of paragraph (d) (5) is to insure that while a governing body is seriously pursuing the redesignation of an area to Class I, the redesignation will not be compromised or nullified by a new or modified source. I would like to stress several basic points about this provision:

1. The issue of which was first in time — the source's permit application or the governing body's announcement of redesignation consideration — is irrelevant under paragraph (d) (5). If the governing body announces such reconsideration any time before a final permit has been issued, paragraph (d) (5) will be triggered.

2. A proposed source need not be located within the political boundaries of the governing body considering the redesignation in order for paragraph (d) (5) to apply. If the source's emissions could pose a threat to the proposed redesignation, then final permit approval would have to be withheld pending EPA's action on the proposed redesignation.

As is true of most aspects of the PSD regulations, the Regions will have to exercise their sound judgment on a case-by-case basis in determining whether a proposed source would be located far enough from the political boundaries of the governing body so as not to pose a threat to the proposed redesignation. This type of judgment should not present novel problems for the Regions, since the PSD regulation ultimately requires (in paragraph (d) (2) (i)) a finding that a source will not violate the applicable increments in any surrounding areas.

I realize that one could read paragraph (d) (5) in a very literal fashion to apply only to sources which would be constructed within the political boundaries of the governing body considering the redesignation. This interpretation would, however, do violence to the basic purpose of the PSD regulation (which is to insure that applicable air quality increments are not violated by new sources, without regard to the political boundaries a source might choose to locate within), and would do violence to the basic intent of paragraph (d) (5) (which is to insure that a pending redesignation will not be jeopardized by a new source).

3. Paragraph (d) (5) will be triggered even where a governing body "announces consideration" of a proposed redesignation. There is good reason for allowing such an early triggering event, since EPA regulations and guidelines require the governing body to go through several procedural steps (including detailed document preparation) before the redesignation can even be formally proposed. If this approach were not taken, then a governing body which was actively and expeditiously endeavoring to secure a redesignation could still find the redesignation compromised or nullified by an intervening permit approval.

We must recognize, however, the potential for abuse in such a case and take care to guard against it. The clause must not operate to allow a governing body to frustrate construction of a source if that governing body does not seriously intend to pursue a redesignation or does not pursue it actively and expeditiously.

Therefore, whenever a governing body announces it is considering a redesignation,¹ and that announcement would affect a proposed source's application, EPA should make clear to the governing body (in writing) that new source approvals will be withheld only so long as the governing body is actively and expeditiously proceeding towards redesignation. EPA should set forth a reasonable schedule of action considering all the circumstances of each case² and notify the governing body that any significant departure from that schedule, or any other evidence that the governing body is not actively and expeditiously pursuing redesignation, would be considered grounds for EPA to suspend the operation of paragraph (d) (5) and complete action on permits being withheld.

Such a suspension of paragraph (d) (5) should not occur automatically upon the failure of a governing body to meet a given deadline. Again, all relevant circumstances would have to be weighed.

¹ No special form of "announcement" is required. Any evidence that the governing body, or an appropriate official thereof, has seriously determined to consider redesignation and has communicated this determination in writing to EPA should suffice. In any event, as discussed in the text above, the form of announcement is not nearly as important as the governing body's follow-up actions in determining whether paragraph (d) (5) should hold up a permit.

² I.e., type of governing body (State? Indian Tribe?), number of potentially-affected jurisdictions, number of other governmental approvals needed, size of area affected, etc. It would probably be wise to develop this schedule in consultation with representatives of the governing body.

For instance, if a delay were caused through no fault of the governing body, it would probably be improper to suspend paragraph (d) (5). The main point is that EPA must remain satisfied that the governing body is doing all that can reasonably be expected to process the redesignation actively and expeditiously.

4. Paragraph (d) (5) only restricts EPA from granting permit *approval* while a redesignation is pending. A Region may therefore carry out all other provisions of paragraphs (d) and (e) in this period (*if it chooses*). This might have the salutary effect of "keeping the heat" on the governing body to complete its redesignation procedures. It might also, however, constitute in a Region's judgment an unwarranted diversion of resources for a permit which may never be issued. The Regions should use their own judgment in this area.

5. A Region may grant a permit pending a redesignation if the Region determines that the source would not violate the increments which would result from the redesignation.

6. When a potential applicant contracts a Region about initiating the permit process, the Region should make the applicant aware of the implications of paragraph (d) (5) so that the applicant may be encouraged to complete its application expeditiously. Obviously, whenever paragraph (d) (5) is triggered, the Region should immediately notify those whose permit applications will be affected.

B. A question has been raised concerning the applicability of the PSD regulations to certain

kinds of coal cleaning plants [§52.21 (d) (1) (ii)], specifically those that do not utilize a thermal dryer. Although the wording of the proposal of §52.21 (d) (1) (ii) read "coal cleaning plants (thermal dryers)" the final regulations read simply "coal cleaning plants." Region VIII has recently interpreted the PSD regulation to cover all coal cleaning plants, regardless of whether a thermal dryer is used. Region VIII's interpretation is correct.

C. One Region has questioned whether a PSD permit can be conditioned to require emission control that goes beyond best available control technology (as when a power plant intends to use low sulfur coal and a flue gas scrubber and will be well below the NSPS for SO₂ from power plants). Unless it is necessary to meet the applicable air quality increment, we can not *require* a source to go beyond BACT. However, should a source indicate on its permit application that its emissions will be less than that which we would ordinarily define as BACT, the lesser emission rate may be made an enforceable condition of the permit. The legally enforceable emission rate should be used for purposes of keeping track of the unused portion of the increment. Obviously, the situation where actual emissions are less than the legally enforceable emission rate presents the potential for a source to "hoard" a major portion of the remaining increment for future expansion. Therefore, where a source will go beyond BACT, Regions should attempt to make the lesser emissions a legally binding permit condition.

D. Finally, some Regional Offices have requested a change to the PSD regulations enabling the Regional Administrator to require the applicants to perform the necessary diffusion modeling. We feel, and OGC concurs, that adequate authority to require such analysis is presently provided under §52.21 (d) (3), which indicates that EPA can require a source to submit "...information necessary to determine the impact that the construction or modification will have on sulfur dioxide and particulate matter air quality levels...".

cc. Regional Counsels
Regional Air Directors
Regional Enforcement Directors

MAY 19 1977

MICHAEL RADWAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-529

MONTANA POWER COMPANY, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-585

AMERICAN PETROLEUM INSTITUTE, ET AL., *Petitioners,*

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WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

BRIEF FOR THE PETITIONERS IN NO. 76-619

**On Writs Of Certiorari To The United States Court Of Appeals
For The District Of Columbia Circuit**

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BRIEF FOR THE PETITIONERS IN NO. 76-619

**On Writs Of Certiorari To The United States Court Of Appeals
For The District Of Columbia Circuit**

OPINION BELOW

The opinion of the Court of Appeals (A. 39a-90a)¹ is reported at 540 F.2d 1114.

JURISDICTION

The judgment of the Court of Appeals (Pet. No. 76-529, App. 91a) was entered on August 2, 1976. This petition was filed November 1, 1976, and was granted April 4, 1977.² The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

The pertinent statutory provisions are set forth in Appendix A, *infra*. The regulations are set forth in the joint appendix, A.206a-291a.

QUESTIONS PRESENTED

1. Whether regulations promulgated by the Environmental Protection Agency to prevent the significant deterioration of air quality are authorized by the Clean Air Act.

2. Whether the Clean Air Act permits the Environmental Protection Agency to adopt regulations which grant to Federal land managers and Indian governing bodies power to reclassify Federal and Indian lands within their jurisdiction.

¹ References to the joint appendix filed with this Court pursuant to Rule 36 will be denoted "A."

² The Court, in granting certiorari, consolidated this petition with other petitions, Nos. 76-529, 76-585, 76-594, 76-603, and 76-620.

STATEMENT

A. The Clean Air Act.

As amended in 1970, the Clean Air Act, 84 Stat. 1676, prescribes a comprehensive regulatory scheme for reducing emissions of certain pollutants into the ambient air. While the Act grants federal authorities certain powers of supervision and enforcement, it reserves to each State the "primary responsibility for assuring air quality within the entire geographic area comprising such State." § 107(a).³

Section 108 directs the Administrator of the Environmental Protection Agency (EPA) to list certain air pollutants, and thereafter issue air quality criteria for such air pollutants. For those air pollutants, § 109(a) requires the Administrator to prescribe a national primary ambient air quality standard and a national secondary ambient air quality standard. National primary ambient air quality standards are "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator . . . allowing an adequate margin of safety, are requisite to protect the public health." § 109(b)(1). A national secondary ambient air quality standard is "a level of air quality the attainment and maintenance of which in the judgment of the Administrator . . . is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence" of the particular air pollutant in the ambient air. § 109(b)(2).

³ Section references to the Act are used in the text; cross references to the United States Code citations appear in the Appendix, *infra*.

Each State is required to submit to the Administrator a "plan which provides for implementation, maintenance, and enforcement" of the national ambient air quality standards. § 110(a)(1). Section 110(a)(2) explicitly provides that the Administrator "shall approve" each submitted State plan, adopted after reasonable notice and hearing, which meets the following eight specified criteria:

(A) (i) In the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan . . . and (ii) in the case of a plan implementing a national secondary ambient air quality standard it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitation . . . and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard . . .

(C) it includes provision for establishment and operation of appropriate . . . procedures necessary to (i) monitor, compile, and analyze data on ambient air quality . . .

(D) it includes a procedure . . . for review . . . of the location of new sources . . .

(E) it contains adequate provisions for inter-governmental cooperation . . .

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment . . . (iii) for periodic reports . . .

(G) it provides . . . for periodic inspection and testing of motor vehicles . . . and

(H) it provides for revision . . . as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard. . . . § 110(a)(2)(A)-(H).

If the State implementation plan does not meet these requirements, the Administrator is required to disapprove the plan and prepare regulations setting forth the implementation plan for the State. § 110(c)(1).

B. History of the Proceedings.

On April 30, 1971, the Administrator promulgated national primary and secondary ambient air quality standards. 36 Fed. Reg. 8186, 40 C.F.R. Part 50. Under the timetable set by the Act, the States were then required to submit to the Administrator their implementation plans by January 31, 1972, and the Administrator was required to approve or disapprove these plans by May 31, 1972.

On November 25, 1971, the EPA published "Requirements for Preparation, Adoption and Submittal of Implementation Plans." 36 Fed. Reg. 22398, 40 C.F.R. Part 51. In areas where the air quality was superior to national primary and secondary standards those requirements permitted implementation plans to allow for emissions into the ambient air up to secondary standards. 40 C.F.R. § 51.12(b). In February, 1972, Administrator Ruckelshaus testified before a Congressional Subcommittee that he would approve any State implementation plan that met the eight specified criteria of § 110(a)(2), none of which required the prevention of significant deterioration. *Hearings on Im-*

plementation of Clean Air Act Amendments of 1970 Before the Subcommittee on Air and Water Pollution of the Senate Public Works Committee, 92d Cong., 2d Sess. Part 1, 246-249, 271-276 (1972).

On May 24, 1972, the Sierra Club and others filed suit in the United States District Court for the District of Columbia seeking a declaratory judgment that "the Administrator's policy to approve state implementation plans which allow for significant deterioration of existing air quality" would violate the Clean Air Act. Sierra Club further sought a preliminary injunction to enjoin the Administrator from approving any State plan that did not provide for nondeterioration. On May 30, 1972, District Judge John H. Pratt held a hearing to consider the motion for a preliminary injunction, and at the conclusion of the hearing Judge Pratt granted the motion. On June 2, 1972, Judge Pratt issued an opinion, *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253 (D.D.C. 1972), to accompany his grant of preliminary injunctive relief. The decision was affirmed by the Court of Appeals for the District of Columbia Circuit, 4 ERC 1815 (per curiam) (unreported in U.S. App. D.C. and F.2d) "on the basis of the opinion filed June 2, 1972, by the District Court (John H. Pratt, District Judge)," and by an equally divided Supreme Court, *sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973).⁴

In the only judicial opinion prior to the promulgation of the significant deterioration regulations, the

⁴ Affirmance by an equally divided Court is "without force as precedent." *Eaton v. Price*, 364 U.S. 263, 264 (1960) (opinion of Brennan, J.). See also, *United States v. Pink*, 315 U.S. 203, 216 (1942).

district court stated that it based its decision on the belief that a general purpose subsection of "the Clean Air Act of 1970, the legislative history of the Act and its predecessor, and the past and present administrative interpretation[s] of the Acts" imposed a nondeterioration requirement on State plans. 344 F.Supp. at 256.

In response to the district court's preliminary injunction, the Administrator disapproved all State implementation plans "to the extent that such plans lack procedures or regulations for preventing significant deterioration of air quality in portions of States where air quality is now better than the secondary standards." 40 C.F.R. § 52.21, 37 Fed. Reg. 23836-37 (Nov. 9, 1972). The Administrator promised to publish, "as soon as possible, proposed regulations setting forth appropriate requirements for modification of State implementation plans." 37 Fed. Reg. 23836.

The first set of such proposed regulations appeared the following year. 38 Fed. Reg. 18986 (July 16, 1973) (A.91a-159a). The Administrator set forth four alternative proposals (the "air quality increment plan," "emission limitation plan," "local definition plan," and "area classification plan"), with a view toward issuing final regulations "under the Clean Air Act [that] would prescribe steps to be taken by the States." *Id.* at A.91a.

A year later, the Administrator repropoed the regulations which had previously appeared as the "area classification plan" alternative, and solicited further "comment on the detailed procedural and technical aspects prior to promulgation." 39 Fed. Reg. 31000

(Aug. 27, 1974). (A.160-205a)⁵ Final regulations were revised on November 27, 1974, 39 Fed. Reg. 42514 (Dec. 5, 1974) (A.206a-246a), and were effective as of January 6, 1975. The regulations were revised on January 16, 1975 (40 Fed. Reg. 2802) (A.242a-245a), June 12, 1975 (40 Fed. Reg. 25004) (A.246a-283a) and September 10, 1975 (40 Fed. Reg. 42001) (A.284a-291a). The regulations appear at 40 C.F.R. §§ 52.01, 52.21.

Upon issuance of the final regulations, petitions for review were filed in the Court of Appeals for the District of Columbia Circuit and in five other courts of appeals (A.11a, 13a, 16a, 17a, 19a, 22a, 26a, 28a, 31a, 32a). All petitions not in the Court of Appeals for the District of Columbia Circuit were transferred to that circuit and consolidated. The various petitioners challenged the regulations from several perspectives. In brief, challenges were made alleging:

—that the regulations were unauthorized by the Clean Air Act;

—that the regulations' grant of redesignation power to Federal land managers and Indian governing bodies abrogated the authority vested in the States by the Clean Air Act;

—that the regulations failed to prevent significant deterioration of existing clean air;

—that the promulgation of the regulations was procedurally defective;

—that the increments established by the regulations were arbitrary and capricious; and

—that the regulations were unconstitutional.

⁵ The Administrator explained that a reproposal was necessary "due to the lack of precise direction either in the Clean Air Act or in the [District] Court order" regarding the implementation of a significant deterioration policy. (A. 165a).

The court of appeals rejected all challenges to the regulations and upheld the regulations in their entirety. (A.39a). Of the two issues presently before this Court, the court of appeals reached the merits only on the issue of whether the regulations were authorized by the Clean Air Act. Addressing that issue, the lower court ruled that two recent decisions⁶ of this Court were not controlling, (A.65a-66a), and that a general purpose section, the legislative history and the administrative interpretation of the Clean Air Act imposed a nondeterioration policy on State implementation plans. (A.54a-67a). The lower court declined to address the issue of whether the authority granted to Federal land managers and Indian governing bodies to redesignate lands independent of State control abrogated the authority granted to the States by the Clean Air Act, finding that issue "not yet ripe for review." (A.86a).

C. The Prevention of Significant Deterioration Regulations.

In broad outline, the regulations are designed to prevent significant deterioration by controlling sulfur dioxide and particulate matter emissions from designated new and modified stationary sources in all States where air quality existing during 1974 was better than primary and secondary ambient standards. 40 C.F.R. § 52.21(c)(1). There are three "areas" established by the regulations: Class I, Class II, and Class III. Increases in pollutant concentrations in areas designated either Class I or Class II are specifically limited, while increases in Class III areas are allowed up to secondary standards. § 52.21(c)(2). The regulations desig-

⁶ *Train v. Natural Resources Def. Council*, 421 U.S. 60 (1975); *Union Electric Co. v. EPA*, 427 U.S. 246 (1976).

nate the entire nation as Class II, § 52.21(c)(3)(i), but provide a procedure whereby the States can propose to redesignate areas to any class; Federal land managers can propose to redesignate any Federal lands only "to a more restrictive designation," *i.e.*, Class I; and whereby Indian governing bodies can propose to redesignate Indian lands to any class. § 52.21(c)(3)(ii), (iv), (v).

SUMMARY OF ARGUMENT

The Clean Air Act Amendments of 1970 sought to remedy deficiencies of earlier anti-pollution enactments by providing for the establishment of detailed air quality and new source performance standards, emission limitation, enforcement mechanisms, precise deadlines, and a clear distribution of Federal and State responsibilities for combatting air pollution that was lacking in prior air pollution legislation.

Section 108(a)(1) provides that: "[f]or the purpose of establishing national primary and secondary ambient air quality standards," the Administrator is directed to list each air pollutant which, among other requirements, he has judged to have an "adverse effect on public health or welfare." Section 109 directs the Administrator to establish national primary and secondary ambient air quality standards for the listed air pollutants; primary standards are defined as those standards which, "allowing an adequate margin of safety, are requisite to protect the public health," while secondary standards are those standards "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence" of the listed air pollutant. Each State is required to adopt a plan to implement, maintain, and

enforce the national primary and secondary standards. § 110. An implementation plan must meet eight criteria, foremost of which is that "it provides for the attainment of [the] primary standard as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan" and that it "specifies a reasonable time" for the attainment of the secondary standard. § 110(a)(2)(A). "For purposes of developing and carrying out implementation plans under section 110," the entire geographic area of each State is designated an air quality control region. § 107. Section 111 limits the emissions of air pollutants from designated new stationary sources by requiring application "of the best system of emission reduction which . . . the Administrator determines has been adequately demonstrated." A designated new stationary source is a source the Administrator has determined "may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare." § 111(b)(1)(A).

Congress enacted these provisions to achieve one of the basic purposes of the Clean Air Act, namely "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." § 101(b)(1). At the same time, Congress has declared that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments." § 101(a)(3). Thus, while establishing eight specific criteria a State implementation plan must satisfy in order to attain, maintain and enforce the national ambient air quality standards, § 110(a)(2)(A)-(H), Congress has directed the Administrator that he "shall approve" a State plan that meets these eight criteria and procedural requirements. Con-

gress further provided, in § 116 of the Act, that a State may choose to impose stricter standards than the national standards, but it nowhere *required* the States to prevent the deterioration of air which is cleaner than the national standards.

Despite its acknowledgement that "prohibition of significant deterioration of air cleaner than the national standards is not an express requirement of the Act," (A.46a-47a) the lower court upheld EPA's regulations that imposed such a nondeterioration requirement upon State implementation plans. In so doing, the lower court ignored the teaching of three recent decisions of this Court—*Train v. Natural Resources Def. Council*, 421 U.S. 60 (1975), *Hancock v. Train*, 426 U.S. 167 (1976) and *Union Electric Co. v. EPA*, 427 U.S. 246 (1976)—disregarded the plain language of § 110(a)(2) of the Act which mandates EPA approval of State implementation plans that satisfy the eight specified criteria of § 110, and based its decision entirely on the phrase "protect and enhance" contained in a purpose clause § 101(b)(1)), bits and pieces of pre-1970 administrative regulations and a two sentence passage from the 1970 Senate report which does not mention either the purpose clause or pre-1970 administrative regulations.

If the Court holds that the Clean Air Act does authorize EPA to promulgate the significant deterioration regulations, it should also hold that the provisions which grant to Federal land managers and Indian governing bodies the power to redesignate Federal and Indian lands violate the Clean Air Act and disrupt the Federal-State relationship so carefully established by the Act. Those provisions permit Federal land managers and Indian governing bodies to redesignate Fed-

eral and Indian lands independent of State control. Because of the extraterritorial reach of a redesignation, Federal land managers and Indian governing bodies are able to "dictate" land use 60-100 miles beyond Federal and Indian boundaries. In the western States in particular, where extensive Federal and Indian land ownership prevails, the result is to give Indian governing bodies and Federal land managers the power to control land use within entire States. There is absolutely no statutory authority for such a result. To the contrary, the Act explicitly declares that "[e]ach State shall have the primary responsibility for assuring air quality within the *entire* geographic area comprising such State." § 107(a). Moreover, the regulations nullify the requirement of § 118 that "makes it the duty of federal facilities to comply with *state-established* air quality and emission standards." *Hancock v. Train*, 426 U.S. 167, 183 (1976) (emphasis supplied).

ARGUMENT

I

A. Section 110 Requires The Administrator To Approve State Implementation Plans That Satisfy The Section's Eight Requirements Even Though The Plans Do Not Contain A Nondeterioration Policy.

Section 110(a)(2) provides that the "Administrator shall approve" a State implementation plan if it has been adopted after public hearings and if it satisfies eight specified criteria that are concerned with the "attainment" and "maintenance" of the national primary and secondary air quality standards promulgated by EPA.⁷ Although the court below conceded

⁷ The eight criteria, section 110(a)(2)(A)-(H), are set forth, *supra* at 4-5.

that none of the eight criteria "implies a nondeterioration standard" (A.55a), it nevertheless upheld the promulgation by EPA of regulations that require State implementation plans to contain provisions to prevent significant deterioration of air that is cleaner than the air quality required by the national standards. EPA's regulations were promulgated in response to an order issued by the lower court in the *Ruckelshaus* case, which rejected the Administrator's contention that he had no authority to disapprove State implementation plans that satisfied the eight specified criteria set forth in § 110(a)(2).

The statutory language is both direct and explicit—"The Administrator *shall* approve" (emphasis supplied). Statutory use of the word "shall" generally denotes a mandatory requirement, that is, commanding some act. See *Escoe v. Zerbst*, 295 U.S. 490 (1935); *Richbourg Motor Co. v. United States*, 281 U.S. 528 (1930). In three recent cases interpreting the Clean Air Act, this Court in discussing § 110(a)(2) stated that the "mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified." *Union Electric Co. v. EPA*, 427 U.S. 246, 252 (1976). *Accord, Hancock v. Train*, 426 U.S. 167, 170 (1976); *Train v. Natural Resources Defense Council*, 421 U.S. 60, 71 n. 11, 79 (1975). The lower court held that these three decisions were not controlling because "the [Supreme] Court did not address the issue" of nondeterioration. (A.64a). Although petitioners agree that those decisions did not *directly* address the nondeterioration issue, we believe those decisions are controlling on the issue of whether the mandatory "shall approve" language in § 110(a)(2) requires the Administrator to approve State im-

plementation plans that meet the § 110(a)(2) criteria, even though the plans do not contain a nondeterioration provision.

The only statutory basis that the lower court cited to support its holding that the Clean Air Act "embodied" a nondeterioration requirement is § 101(b)(1),⁸ which sets forth one of the Act's purposes. Yet, the lower court conceded that "prohibition of significant deterioration of air cleaner than the national standards is not an express requirement of the Act." (A.46a-47a). Moreover, in seeking to impose a specific requirement of nondeterioration upon § 110 implementation plans, the court below misconstrued § 101(b)(1), which declares that one of the basic purposes of the Act is:

to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population.⁹

⁸ The lower court further sought to support its holding based on selected administrative interpretations of the 1967 Air Quality Act, 81 Stat. 485, and the legislative history of the Clean Air Act, as amended. Petitioners address these issues *infra* at 22-34.

⁹ Even if § 101(b)(1) implies a nondeterioration concept as contended by the lower court (A. 46a-47a), it still can not impose such a requirement upon § 110 implementation plans. The law is settled that "[h]owever inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.' *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208." *MacEvoy Co. v. United States*, 322 U.S. 102, 197 (1944). See also, *Fourgo Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957). Section 110 is specific in its requirements. Section 101(b)(1), on the other hand, contains general language only. Moreover, where two statutory provisions conflict, the later in time is con-

Citing the legislative history of § 101(b)(1), the lower court held that the "protect and enhance" language expresses a policy of nondeterioration. (A.56a).¹⁰ Such a construction of "protect and enhance" is reached by isolating those words not only from the rest of the Act, but from the remainder of the sentence. This violates the fundamental rule "that a section of a statute not be read in isolation from the context of the whole act." *Richards v. United States*, 369 U.S. 1, 11 (1962).

The "protect[ion] and enhance[ment]" of the air quality is for the express purpose of promoting "the public health and welfare and the productive capacity" of the Nation's population. Section 108 requires the Administrator to list and establish air quality criteria for air pollutants which in his judgment have "an adverse effect on public health or welfare."¹¹ And § 109 directs the Administrator to promulgate national primary and secondary air quality standards once he has established air quality criteria. National primary standards are defined as those which, "allowing an adequate margin of safety, are requisite to *protect the public health*." § 109(b)(1) (emphasis supplied). National secondary standards are defined as those "requisite to *protect the public welfare* from any known or anticipated adverse effect" associated with the air pollutant. § 109(b)(2) (emphasis supplied).

trolling. *Adkins v. Arnold*, 235 U.S. 417, 421 (1914). Section 110 is later in time than § 101(b)(1), having been enacted as part of the 1970 Amendments to the Clean Air Act, whereas § 101(b)(1) was part of the Air Quality Act of 1967. See *infra* at 24-25.

¹⁰ Petitioners discuss the legislative history of § 101(b)(1) *infra* at 24-25.

¹¹ Two other requirements must be met before an air pollutant can be listed. § 108(a)(1)(B)-(C).

The State implementation plans are to provide for the "implementation, maintenance, and enforcement" of the primary and secondary standards. § 110(a)(1). The first of the eight specified criteria for an implementation plan, § 110(a)(2)(A), requires that a State plan provide for "the attainment of such primary standard as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan" and for the attainment of the secondary standard within "a reasonable time."

The remaining provisions of § 110(a)(2) specifically detail the other criteria by which the States, in their implementations plans, are to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare." And, as even the lower court recognized, the prevention of deterioration of air cleaner than the national standards is not among them. The foregoing construction of § 101(b)(1) and § 110(a)(2) is consistent with the "anatomy" and "structure" of the Act, *Train, supra*, 421 U.S. at 63, 86. However, the lower court's construction of § 101(b)(1) superimposes a ninth requirement—nondeterioration—upon § 110 State implementation plans. The court's construction conflicts with the mandatory language of § 110 which requires approval of State plans which meet the eight specified criteria. In cases of such conflict, the construction that would permit both provisions of the statute to stand should be employed. *United States v. Moore*, 95 U.S. 760 (1878). Since petitioners' construction of § 101(b)(1) "admits a reasonable construction which gives effect to all of [the Clean Air Act's] provisions," *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961), that construction should prevail.

B. The Prevention Of Significant Deterioration Regulations Are Inconsistent With Other Provisions Of The Clean Air Act.

Section 110(e)(1) provides that the Administrator shall "prepare and publish proposed regulations setting forth an implementation plan" for a State if—and only if:

(A) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

(B) the plan . . . submitted for such State is determined by the Administrator not to be in accordance *with the requirements of this section* [§ 110], or

(C) the State fails . . . to revise an implementation plan as required [to achieve national primary or secondary ambient air quality standards]. . . . (emphasis supplied).

None of the three circumstances authorizes the Administrator to promulgate an implementation plan, or portion thereof, if a State plan fails to contain a requirement preventing the deterioration of air cleaner than the national standards. The district court in *Ruckelshaus* nonetheless ordered the Administrator to disapprove State plans that failed to contain nondegradation provisions, and to promulgate amendments to those plans to incorporate regulations that would provide for prevention of significant deterioration.¹²

The regulations are likewise inconsistent with the Clean Air Act as amended by the Energy Supply and Environmental Coordination Act of 1974. 88 Stat. 246. That Act, designed to encourage stationary fuel-burn-

¹² See, e.g., 40 C.F.R. §§ 52.343 (Colorado), 52.683 (Idaho), 52.2346 (Utah), 52.2630 (Wyoming).

ing sources to convert from oil to coal, requires the Administrator to review State implementation plans to determine whether "such plans can be revised in relation to fuel burning stationary sources . . . without interfering with the attainment and maintenance of any national ambient air quality standard." § 110(a)(3)(B). If a plan can be revised, the State shall be so notified and "[a]ny plan revision which is submitted by the State shall . . . be approved by the Administrator if the revision relates only to fuel burning sources . . . and the plan as revised complies" with § 110(a)(2). Again, the Administrator has no discretion in approving or disapproving a revised plan—if the revised plan complies with the eight criteria of § 110(a)(2) and the other general requirements of the subsection the Administrator "shall" approve the plan. *Train v. Natural Resources Def. Council, supra*, 421 U.S. at 65. Moreover, the limitation Congress imposed on a revision to a State implementation plan is that it not interfere "with the attainment and maintenance of any national ambient air quality standard." § 110(a)(3)(B). Revisions are not limited by a requirement of nondegradation. The court below asserted that conversion to coal "certainly will impair both improvement and maintenance of air quality" but stated that "there is no reason to believe that passage of ESECA was intended to eliminate the requirement of nondeterioration." (A.66a). The fallacy of this argument, of course, is that it assumes there is a "requirement" of nondegradation.

The lower court ignored completely the provisions of § 111 and its legislative history which demonstrate that Congress meant for the Federal government to focus on the prevention of new pollution prob-

lems by the establishment of federal standards of performance for new (and modification of existing) sources. Yet, just a week prior to the decision of the court below, another panel of the District of Columbia Circuit concluded that "[T]he Clean Air Act, and section 111 in particular, was also designed to prevent new pollution problems, especially the deterioration of air quality in areas where existing air quality levels exceed the promulgated air quality standards." *National Asphalt Pavement Association v. Train*, 539 F.2d 775, 783 (D.C. Cir. 1976) (emphasis supplied).

Section 111 directs the Administrator to establish federal standards of performance for new and modified stationary sources. Section 111 is applicable to stationary sources listed by the Administrator, the construction or modification of which are commenced after the publication of regulations prescribing a standard of performance.¹³ A "standard of performance" means "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which . . . the Administrator determines has been adequately demonstrated." § 111(a)(1).

That § 111 was the means chosen by Congress to prevent new pollution problems is evidenced in both the House and Senate reports accompanying the 1970 Amendments. The House reported that the provision for control over new stationary sources was enacted

¹³ To date, the Administrator has listed 24 categories of stationary sources which are subject to the requirements of § 111. 40 C.F.R. Part 60, Subparts D-AA. The construction or modification of fossil-fuel fired steam generators such as those operated by petitioners are subject to the requirements of § 111. 40 C.F.R. Part 60, Subpart D.

to "prevent the occurrence anywhere in the United States of significant new air pollution problems. . . ." H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 3 (1970). That view was shared by the Senate Committee, which concluded:

The overriding purpose of this section would be to prevent new air pollution problems, and toward that end, maximum feasible control of new sources at the time of their construction is seen by the committee as the most effective and, in the long run, the least expensive approach. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 16 (1970).¹⁴

Section 111 reflects the dual objective of preventing air pollution, without at the same time unduly inhibiting economic growth. Thus, § 111 balances competing interests so as to best attain the general purpose set forth in § 101(b)(1) of promoting "public health and welfare and the productive capacity" of the Nation's population. Emissions of air pollutants are minimized by employing the "best system of emission reduction," while at the same time economic development and growth are not altogether prohibited. This is the means chosen by Congress to prevent new pollution problems. By contrast, the significant deterioration regulations impose an absolute prohibition against construction or modification of a source if it will violate an air quality increment in a designated area. 40 C.F.R. § 52.21(d)(2)(i).

Moreover, consistent with the principle "that the prevention and control of air pollution at its source

¹⁴ And the Senate committee in the general statement of its report stated: "Maintenance of existing high quality air is assured through provision for maximum control of new major pollution sources." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 2 (1970).

is the primary responsibility of States and local governments," § 101(a)(3),¹⁵ Congress preserved the States' freedom, in § 116, to impose a more stringent "standard or limitation respecting emissions of air pollutants." Thus, § 116 leaves to the individual States the management of economic growth as limited by the national primary and secondary ambient air quality standards. If a nondeterioration policy is to be imposed, it is to be done by the individual States, and not by the Federal government.

On its face, the Act is explicit in its standards and requirements. Nowhere in the Act is a nondeterioration policy such as that imposed by the significant deterioration regulations authorized. Those regulations contravene the directives of the Act. Although the Act is so clear and unequivocal that it presents a classic justification for not resorting to its underlying legislative history, *see, e.g., United States v. Oregon*, 366 U.S. 643, 648 (1961), an examination of the legislative history is in order since the lower court found, "in the legislative history of the Clean Air Act of 1970, a clear understanding that the Act embodied a pre-existing policy of nondeterioration of air cleaner than the national standards." (A.55a). As we show below, the legislative history does not in fact provide the support necessary to validate the significant deterioration regulations promulgated by the Administrator.

C. The Legislative History Of The Clean Air Act Does Not Support The Significant Deterioration Regulations.

The lower court acknowledged that "prohibition of significant deterioration of air cleaner than the na-

¹⁵ "The Amendments place the primary responsibility for formulating pollution control strategies on the States." *Union Electric Co. v. EPA*, *supra*, 427 U.S. at 256.

tional standards is not an express requirement of the Act." (A.46a-47a). It nonetheless upheld the Administrator's promulgation of significant deterioration regulations because the court found, "in the legislative history of the Clean Air Act of 1970, a clear understanding that the Act embodied a *pre-existing policy* of nondeterioration of air cleaner than the national standards." (A.55a) (emphasis supplied). Having discovered this "pre-existing policy" and finding "no support for the proposition that *the addition of Section 110(a)(2)* was intended to limit that policy in any way" the lower court reaffirmed its prior *per curiam* decision in *Sierra Club v. Ruckelshaus*. *Id.* (emphasis supplied).

The lower court nowhere explained how there could be a "pre-existing policy of nondeterioration of air cleaner than the national standards" since there were no national ambient air quality standards or legislation requiring the setting of national standards prior to the Clean Air Act Amendments of 1970. Nor did the lower court explain the significance, if any, of its characterization of § 110(a)(2) as merely an "addition" to the Clean Air Act of 1970. The "national standards" to which the court referred to support its premise of a "pre-existing [i.e., pre-1970] policy" of nondeterioration were likewise "additions" enacted as part of the 1970 Amendments to the Clean Air Act. In short, contrary to the conclusion of the lower court—a conclusion which is at the core of its decision upholding the validity of the nondeterioration regulations—there could not have been a "pre-existing policy of nondeterioration of air cleaner than the national standards" because such standards simply did not exist

prior to the Clean Air Act of 1970.¹⁶ The fact is, and examination of the legislative history of the Act reveals, that a policy of nondeterioration of air cleaner than the national standards has never been embodied in the Clean Air Act.

The legislative history of § 101(b)(1)—the only statutory provision the lower court cited in support of its decision to uphold the significant deterioration regulations—does not express a policy of nondeterioration. Because the court below relied so heavily on the § 101(b)(1) phrase “protect and enhance,” it is illuminating to trace the origins of that language.

In the Clean Air Act of 1963, 77 Stat. 392, Congress declared that a purpose of the Act was “to protect the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population. . . .” 77 Stat. 393.¹⁷ Section 5 of the 1963 Act sought to achieve that general purpose by authorizing the Attorney General to sue for the abatement of “pollution of air which is endangering the *health or welfare* of persons in a State or States other than that in which the discharge or discharges . . . originate.” 77 Stat. 396-398 (emphasis supplied).

The phrase “and enhance the quality of” was added after the words “to protect” by the Air Quality Act of 1967. 81 Stat. 485. This phrase reflected the 1967 Amendments’ prime purpose, which was “to strength-

¹⁶ The 1967 Air Quality Act directed each *State* to adopt ambient air quality standards applicable to any designated air quality control region. 81 Stat. 491.

¹⁷ Thus, the lower court is not quite accurate when it states that the “‘protect and enhance’ language of the Clean Air Act was added by the Air Quality Act of 1967.” (A.55a).

en the Clean Air Act . . . and to enhance the quality of the atmosphere to protect the health and welfare of [the] citizens against long-term hazards and immediate danger.” S. Rep. No. 403, 90th Cong., 1st Sess. 2 (1967).

One means by which the 1967 Amendments sought to strengthen the Clean Air Act of 1963 was the designation of “air quality control regions.” But air quality control regions did *not* include clean air areas. Rather, they were confined to those areas deemed “necessary for the establishment of air quality standards to protect public health and welfare.” H. R. Rep. No. 728, 90th Cong., 1st Sess. 33 (1967). *See also*, S. Rep. No. 403, 90th Cong., 1st Sess. 25 (1967). Air quality control regions were “those communities which, because of the extent of urbanization and industrialization, meteorological factors, and so on, are affected by a common air pollution problem requiring conformity of action.” H. R. Rep. No. 728, 90th Cong., 1st Sess. 15 (1967). Moreover, if “an area is not now a problem area,” it is only in the event that “the air quality . . . *deteriorates below the level required to protect the public health and welfare*” that the Department of Health, Education and Welfare would be “required to designate that region for the establishment of air quality standards. . . .” S. Rep. No. 403, *supra* at 4 (emphasis supplied).

Ignoring the air quality control region and protection of health and welfare concepts that were integral parts of the 1967 Act, the court below declared that the “administrative interpretation and, to a lesser degree, the legislative history of the Air Quality Act expressed a policy of nondeterioration.” (A.56a). The authorities noted by the court below (A.56a, n. 30), in

fact provide no support for a "policy of nondeterioration" that relates to air cleaner than the national standards, which is the issue in this case.

The court below stated that the National Air Pollution Control Administration of HEW, which administered the 1967 Act, "formalized the concept of nondeterioration" in its Guidelines for the Development of Air Quality Standards and Implementation Plans. (A.56a, n. 30). To support this statement the court quoted the following language:

[A]n explicit purpose of the [1967] Act is to 'protect and enhance the quality of the Nation's air resources' (emphasis added by the court). Air quality standards which, even if fully implemented, would result in *significant deterioration* of air quality in any substantial portion of an air quality control region clearly would conflict with this expressed purpose of the law. (emphasis supplied).

Since, under the 1967 Act, *only* an area with air pollution problems was designated an "air quality control region" and since in the quoted statement "significant deterioration" related specifically to an air quality control region, the so-called "formalized" "concept of nondeterioration" did not refer at all to areas where the air is clean, much less to air cleaner than the "national standards" which were not yet in being. To the contrary, the Guidelines were specifically addressing the establishment of the air quality standards for air quality control regions, which, under the 1967 Act, were those areas where air quality had already reached levels that endangered the health or welfare of persons affected. Thus, as Senator Muskie explained the 1967 Act on the Senate floor, the "fact that an area is not

now a problem area will not mean that controls will never be required. *When the air quality of any region deteriorates below the level required to protect public health and welfare*, the Secretary is required to designate that region for the establishment of air quality standards enforceable by the Federal Government if the States fail to act." 113 Cong. Rec. 19172 (July 18, 1967) (emphasis supplied).

The court ignored this explanation and cited instead an isolated portion of another statement by Senator Muskie "for the proposition that it was necessary 'to assure the lessening of current levels of pollution and to prevent further environmental deterioration in the future.'" (A.56a, n. 30). But, the sentence in its entirety and the subsequent sentence state:

We must define the steps necessary to assure the lessening of current levels of pollution and to prevent further environmental deterioration in the future. And recognizing the importance of the economic-technological-environmental relationship we must develop the requisite framework to implement the desired goals. S. Rep. No. 403, 90th Cong., 1st Sess. 8-9 (1967).

The "steps" and "framework" referred to by Senator Muskie and established by Congress in the 1967 Amendments were designed to abate air pollution in "air quality control regions" where, because of "urban-industrial concentrations, and other factors" (§ 107(a)), the air quality "endangers the health and welfare of . . . persons" (§ 108(a)). 81 Stat. 491. There was absolutely no provision in the 1967 Amendments that established a nondeterioration policy for high quality ambient air areas. Indeed, "deterioration" was only discussed in the context of the air quality control

regions in the 1967 Act and the ambient air quality levels necessary to protect "the public health and welfare." And the 1970 Clean Air Act Amendments specifically embraced the "health and welfare" concept in the Act's operative provisions by requiring the Administrator of EPA: (1) to establish national primary standards requisite to protect public health; (2) to establish national secondary standards requisite to protect the public welfare; and (3) to approve State implementation plans which meet the eight specified statutory criteria designed to achieve the national primary and secondary standards within the required time frames established in the Act.

The lower court cited excerpts of testimony of HEW Secretary Finch and Undersecretary Veneman from the Senate hearings on the 1970 Clean Air Act Amendments which the court believed expressed "their clear understanding that the 'protect and enhance' language of Section 101 mandated the policy of nondeterioration." (A.56a).

The lower court quoted two paragraphs of Secretary Finch's prepared testimony. The first quoted paragraph points out that States "would have the *option* of designing their implementation plans to achieve or preserve higher than national [air] quality levels, *if they wished to do so.*" (A.57a) (emphasis supplied). This statement is completely consistent with the provisions ultimately enacted in § 116 of the 1970 Act and totally inconsistent with the court's conclusion that the Administrator of EPA has authority to *require* the States to prevent the deterioration of air cleaner than the national standards.

The second quoted paragraph from Secretary Finch's prepared testimony—that "it has been and

will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with the ['protect and enhance'] provision" and that "[w]e shall continue to expect States to maintain air of good quality where it now exists" *Id.*—is at best equivocal. But whatever its meaning, an earlier paragraph in the Secretary's statement—which the lower court did not cite—unequivocally declared that "[t]he provisions for national air quality standard-setting would not impair any State's right to establish standards requiring higher levels of air quality. This right is stated as a national policy in section 109 [presently § 116] of the Clean Air Act, and there would be no change in this policy." (*Air Pollution—1970*, Hearings before the Subcommittee on Public Works, Part I, 132 (1970)). And that declaration, the substance of which was repeated in the first paragraph of the Secretary's statement quoted in the lower court's opinion and as well by Undersecretary Veneman,¹⁸ is wholly at odds with

¹⁸ Undersecretary Veneman, who submitted Secretary Finch's written statement, also declared that

The provisions for national air quality standard setting would not impair any State's right to establish standards requiring higher levels of air quality.

I think we should particularly emphasize that point, that this right is stated as a national policy in the Clean Air Act, and it is a right that we affirm. *Air Pollution—1970*, *supra* at 143.

Again, the lower court ignored this portion of the Veneman testimony and quoted instead another portion of his extemporaneous statement which essentially repeated the second paragraph of Secretary Finch's prepared testimony relied upon by the lower court. The Veneman language relied upon by the lower court is, like the similar Finch language, ambiguous, contrary to the explicit recog-

the notion that the States are *required* to prevent deterioration of air cleaner than the national standards—especially in light of the lower court's recognition that "prohibition of significant deterioration of air cleaner than the national standards is not an express requirement of the Act." (A.46a-47a). But Congress did expressly provide the States with the *option* in § 116 to establish standards demanding higher levels of air quality than the national, federally-established standards, and it is that option which the lower court has withdrawn from the States, solely on the basis of its view of portions of legislative history.

Finally, the court below attempted to uphold the validity of the significant deterioration regulations by citing two sentences in the 1970 Senate report, (A.57a-58a):

In areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality. Once such national goals are established, deterioration of air quality should not be permitted except under circumstances where there is no available alternative. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 11 (1970).

The court below treated this report language as a "nondeterioration mandate" (A.59a), and concluded

tion of both men and contrary to the explicit provisions of the 1970 Clean Air Act Amendments that it is for the *States*—and not the EPA Administrator—to decide whether to establish air quality standards more stringent than the national primary and secondary standards.

that, by contrast, "there was no particular significance ascribed to the 'shall approve' language of the section which became Section 110(a)(2)." (A.58a). On the contrary, petitioners suggest the "particular significance" to be "ascribed to the 'shall approve' language of § 110(a)(2) is that it indeed became law with the passage of the 1970 Amendments to the Clean Air Act. And, as this Court made clear in *Train v. Natural Resources Def. Council*, *supra*, 421 U.S. at 79, "the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards . . ." (emphasis in original). On the other hand, the "nondeterioration mandate contained in the Senate report," to which the lower court refers, is nowhere set forth in the Clean Air Act in *any* form, much less as a "mandate" to the States.

Apart from this vital difference between a "mandate" presumably contained in a Senate report and the "mandate" actually set forth in § 110(a)(2) of the Clean Air Act of 1970, the fact is that the two sentences which the lower court characterized as a "nondeterioration mandate" falls far short of justifying the conclusion that the Federal government was thereby authorized to *require* sovereign States to prevent the deterioration of air cleaner than the national standards. In the first place, neither sentence mentions the "protect and enhance" language of the § 101(b)(1) purpose clause of the Act repeatedly referred to by the lower court as the sole statutory basis for a nondeterioration policy. Furthermore, if there were indeed a "pre-existing policy of nondeterioration of air cleaner than the national standards" as the lower court found from its reading of the "legislative history

of the Clean Air Act of 1970," (A.55a), certainly that policy would have surfaced in the only two sentences in the Senate report the court below could find to support its "nondeterioration mandate" conclusion. Yet, such a "pre-existing policy" is nowhere described or referred to in either sentence. To the contrary, the language speaks prospectively of the establishment of "national goals." Even then, the quoted language *suggests*, it does not *mandate*, disapproval of State implementation plans—"the Secretary *should* not approve." And that suggestion is itself further qualified in two respects—first, it relates to an implementation plan "which does not provide, *to the maximum extent practicable*, for the continued maintenance of such ambient air quality" (emphasis supplied). Secondly, the suggestion refers to the situation "[o]nce such national goals are established"—i.e., once the federally established levels of air quality are set—"deterioration of air quality *should* not be permitted except where there is no available alternative." (emphasis supplied). It would seem that this language refers to maintaining air quality at the federal standards, once achieved, particularly in light of the very next sentence in the Senate report, which states as follows:

Given the varying alternative means of preventing and controlling air pollution—including the use of the best available control technology, industrial processes, and operating practices—and care in the selection of sites for new sources, land use planning and traffic control—deterioration need not occur. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 11 (1970).

Although the lower court held that "there was no particular significance ascribed to the 'shall approve' lan-

guage" of § 110(a)(2) (A.58a), the legislative history of § 110 makes it quite clear that Congress knew what it was saying and meant what it said by inclusion of the "shall approve" language.

The Senate report stated that the Administrator "shall approve" a State plan if it meets designated criteria, none of which expressed a nondeterioration policy. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 55 (1970). The House report declared that a State plan "will be applied" if the Administrator determines that the plan meets four requirements, none of which expressed a nondeterioration policy. H. R. Rep. No. 91-1146, 91st Cong., 2d Sess. 8 (1970). And the Conference report, in summarizing the Senate and House bills, stated that under the House bill the Administrator "was to approve" a plan if it met the listed requirements, and under the Senate bill the Administrator "was required to approve" a plan that met the listed requirements. H. R. Rep. No. 91-1783, 91st Cong., 2d Sess. 45 (1970). The language is consistent in its mandatory tone requiring the Administrator to approve plans that meet the designated criteria of § 110. Nowhere is there language permitting, much less requiring, the Administrator to disapprove a State plan for failure to include a nondeterioration requirement.¹⁹

Thus, neither the language of the Clean Air Act nor its legislative history, supports a policy of nondeteri-

¹⁹ The lower court concluded that it was "significant . . . that recent congressional statements have supported the historic existence of a requirement of nondeterioration." (A.61a). Quite the contrary, though, it is not significant, for the "views of a subsequent Congress of course provide no controlling basis from which to infer the purposes of an earlier Congress. *Haynes v. United States*, 390 U.S. 85, 87 n. 4 (1968).

oration. The legislative history of § 110(a)(2) and the enacted language demonstrates that Congress knew how to create a mandate when it wanted a mandate. The disapproval by the Administrator of State plans for failure to contain a nondeterioration policy and the subsequent promulgation of the significant deterioration regulations violate the Clean Air Act.

II.

A. The Regulatory Provisions Violate The Clean Air Act Insofar As They Authorize Federal Land Managers And Indian Governing Bodies To Redesignate Federal And Indian Lands Independent Of State Control.

The question whether the Clean Air Act empowers the Environmental Protection Agency to grant Federal land managers and Indian governing bodies authority to redesignate Federal and Indian lands need not be reached if the Court holds that the regulations are invalid in their entirety, as we urge in Part I, *supra*. If the Court holds that a nondeterioration policy is authorized by the Clean Air Act, the second issue emerges: whether the Act authorizes Federal land managers and Indian governing bodies to redesignate Federal and Indian lands independent of State control.

1. The Redesignation Provisions.

The prevention of significant deterioration regulations initially designated all applicable areas as Class II. 40 C.F.R. § 52.21(c)(3). Redesignation of these areas may be proposed by the States, Federal land managers, or Indian governing bodies, subject to approval by the Administrator. *Id.*

A State may propose to redesignate an area within its boundaries to either a Class I or Class III designation provided certain procedural prerequisites are followed.²⁰ 40 C.F.R. § 52.21(c)(3)(ii). Where Federal lands are located within a State, that State may propose to redesignate those lands so long as the redesignation is consistent with adjacent State and privately owned lands, and the redesignation is proposed after consultation with the Federal land manager. 40 C.F.R. § 52.21(c)(3)(iii).

However, a Federal land manager may propose to redesignate any Federal lands to a "more restrictive designation than would otherwise be applicable" provided that he follows procedures "equivalent to those required of States" and that the redesignation is proposed after consultation with the State(s) in which the Federal land is located or which borders the Federal land. 40 C.F.R. § 52.21(c)(iv).²¹

Moreover, an Indian governing body may propose to redesignate to either a Class I or Class III designation the lands over which it has jurisdiction provided that it follows procedures equivalent to those required of the States and that it consults with the State(s) in which the lands are located or border. 40 C.F.R. § 52.21(c)(v). For Indian lands held in trust, the redesigna-

²⁰ Those prerequisites are: that at least one public hearing be convened, 40 C.F.R. § 52.21(c)(3)(ii)(a); that neighboring States be notified at least 30 days prior to the public hearing, 40 C.F.R. § 52.21(c)(3)(ii)(b); that a discussion of the reasons for the redesignation be made available for public inspection at least 30 days prior to the hearing, 40 C.F.R. § 52.21(c)(3)(ii)(c); and that the redesignation be based on the record of the State's hearing, 40 C.F.R. § 52.21(c)(3)(ii)(d).

²¹ Federal land managers may not propose to redesignate Federal lands to the more lenient Class III designation.

tion must have the approval of the Secretary of the Interior. 40 C.F.R. § 52.21(c)(v)(b).

The regulations further provide that the Administrator shall approve any redesignation proposed by a State, Federal land manager, or Indian governing body so long as the prescribed procedural requirements have been met and provided that the redesignating entity has not "arbitrarily and capriciously" disregarded the area's anticipated growth, the "social, environmental, and economic effects" of the redesignation upon the area and "upon other areas and States," and the redesignation's impact upon "regional or national interests." 40 C.F.R. § 52.21(c)(3)(vi).²² In the event a State or Indian governing body protests a proposed redesignation, the Administrator may approve it only if he determines in his "judgment," that the redesignation "appropriately balances" the "considerations" quoted above.

As we show below, these regulations encroach upon the primary role reserved to the States under the Clean Air Act for controlling air pollution within their entire geographic areas.

2. The Clean Air Act Explicitly Grants The States The Primary Responsibility For Controlling Air Quality Throughout Their Entire Geographic Areas.

Even though Congress "took a stick to the States," *Train v. Natural Resources Def. Council, supra*, 421 U.S. at 64, with the passage of the Clean Air Amend-

²² A State redesignation proposal will not be approved unless the State has requested and been delegated by EPA the responsibility for carrying out preconstruction review of new sources in accordance with provisions of the regulations, § 52.21(c)(3)(vi)(a)(3).

ments of 1970, it explicitly provided that, "[e]ach State shall have the primary responsibility for assuring air quality *within the entire geographic area comprising each State. . . .*" § 107(a) (emphasis supplied). Congress also declared, in § 101(a)(3), that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments." This Court has recognized that "the primary responsibility for formulating pollution control strategies [is] on the States. . . ." *Union Electric Co. v. E.P.A.*, 427 U.S. 246, 256 (1976). *Accord, Hancock v. Train*, 426 U.S. 167, 181 (1976).

Despite the clarity of § 101(a)(3) and § 107(a) of the Act in this regard, the Administrator attempted to justify his withdrawal of the States' authority and his grant of powers to the Federal land managers and Indian governing bodies in the following terms:

This approach is consistent with section 118 of the Clean Air Act (42 U.S.C. 1857f) which requires that Federal agencies having jurisdiction over any property or facility meet substantive State air pollution control standards and limitations. There is nothing in the Clean Air Act or the legislative history of that Act that indicates the Congress intended to preclude the Federal Government from meeting more restrictive standards than are imposed by the States, 39 Fed. Reg. 42513 (Dec. 5, 1974). (A.222a).

This Court recently had occasion to construe § 118 of the Clean Air Act in *Hancock v. Train*, 426 U.S. 167 (1976). That section of the Act directs federal facilities to "comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution *to the same extent that any per-*

son is subject to such requirements" (emphasis supplied). And although the Court held that § 118 does not require existing federal facilities to obtain State permits in order to continue operations, it acknowledged that § 118 of the Clean Air Act "makes it the duty of federal facilities to comply with *state-established* air quality and emission standards." *Hancock v. Train*, *supra*, 426 U.S. at 183 (emphasis supplied).

The Court pointed out:

There is agreement that § 118 obligates existing federal installations to join nonfederal sources in abating air pollution, that comparable federal and nonfederal sources are expected to achieve the same levels of performance in abating air pollution, and that *those levels of performance are set by the States*. *Id.* at 182-183. (emphasis supplied).

The regulations, by empowering Federal land managers to redesignate Federal lands independent of State control, not only are contrary to the explicit provisions of § 101(a)(3) and § 107(a), they also are contrary to both the letter and the spirit of § 118, as interpreted by this Court in *Hancock*. By treating Federal land managers as *superior* to "any person" that is subject to State requirements, the regulations violate § 118's explicit directives that Federal land managers engaged in any activity which may result in the discharge of air pollutants be treated "the same" as "any person." And it is no answer that there is nothing in the Act "that indicates the Congress intended to preclude the Federal government from meeting more restrictive standards than are imposed by the States." There is much in the Act that makes it clear that it is for the *States* and *not* the Federal government to choose, if they wish, to impose standards more restric-

tive than the national standards, *e.g.*, §§ 116, 101(a)(3) and 107(a).²³

In any event, it is clear from the Administrator's own description of the regulations' impact that far more power is delegated to the Federal land managers (and Indian governing bodies) than merely the opportunity to set *for themselves* "more restrictive standards than are imposed by the States." Indeed, under the regulations, Federal land managers and Indian governing bodies can substantially influence and even "dictate" land uses not only on Federal and Indian lands, but also on State, local and private lands.

This ability to control land use in surrounding areas was acknowledged by the Administrator upon promulgation of the final significant deterioration regulations:

[B]ecause of the small *air quality increments specified for Class I areas*, these levels can be violated by a source many miles inside an adjacent Class II or III area. For example, a power plant which just meets the Class II increment for SO₂ could under some conditions violate the Class I increment for SO₂ 60 or more miles away. Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State. Therefore, wherever a Class I area adjoins a Class II or III area, the potential growth restrictions, especially for power plant

²³ Since Indian governing bodies are not accorded preferential treatment under the Act, they also are subject to State requirements. A "general Act of Congress appl[ies] to Indians as well as to all others in the absence of a clear expression to the contrary." *Federal Power Com's. v. Tuscarora*, 362 U.S. 99, 120 (1960).

development, extends well beyond the Class I boundaries into the adjacent areas. . . . [I]t should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment. 39 Fed. Reg. 42512 (Dec. 5, 1974) (emphasis supplied). (A.218a-219a).

The "Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality," January 1975, (R.93-211), mirrors the Administrator's view of December 5, 1974 that construction of a power plant in a Class II area can violate the Class I increment 60 miles away, (R. 127), and reaffirms that "permissible siting of new sources will be dictated by the adjoining Class I rather than the Class II or III increment" (R. 129).

Reference 15 to the Technical Support Document (EPA memo, Aug. 12, 1974) (R. 194) predicts that impact on Class I areas will be even greater:

It should be noted that a power plant in the size ranges discussed here [1,000 MW] may endanger a Zone I increment for a distance of 80 miles downwind under poor dispersion condition. (R. 194).

* * *

[I]t was determined that a plant which just meets the Zone II increment, may exceed the Zone I increment for a distance as great as 80 miles downwind. Thus it appears that such a power plant should not be located any closer than 80 miles from the nearest Zone I boundary. *Id.* at 102.

And according to Reference 16 (EPA memo, Oct. 15, 1974) (R. 202-205),

it can be concluded that it is reasonable to expect a 1,000 MW plant meeting NSPS to endanger the Zone I SO₂ increment to a distance of 50-60 miles downwind. For larger plants located for example in a Zone III area this increment will be endangered for greater distances downwind. (R. 203).

The consequences of a Class I area designation which makes it possible to "dictate" land use 60 and more miles away from the Class I border have severe ramifications regarding the control and planning of land use. For many western states, the impact of the regulations is that Federal land managers and Indian governing bodies are now able to occupy a primary, if not *the* primary role in controlling a State's land use. This usurpation of State land use control is exemplified in the four states—Utah, Idaho, Colorado and Wyoming—in which petitioners herein operate electric generating units. The figures in the table below show the far-reaching extent of Federal and Indian land holdings within the four states.

State	Federal Acreage ²⁴	Federal Lands As Percentage Of State	Indian Acreage ²⁵	Indian Lands As Percentage Of State	Federal & Indian Lands As Percentage Of State
Utah	34,882,460	66%	2,274,391	4%	70%
Colorado	23,973,450	36%	755,163	1%	27%
Wyoming	29,927,861	48%	1,886,329	3%	51%
Idaho	33,732,820	64%	795,419	1%	65%

²⁴ United States Department of Interior, Bureau of Land Management, *Public Land Statistics*, Table 7 (1975).

²⁵ United States Department of Interior, Bureau of Indian Affairs, *Annual Report of Indian Lands*, Acreage as of September 30, 1976 (to be published).

The effect of these pervasive Federal and Indian land holdings is even more dramatic than the figures themselves indicate. In the western States especially, State and private lands are virtually engulfed by the Federal and Indian lands, as the U.S. Department of the Interior, Federal Lands Map vividly portrays. *See Appendix C, infra.* The significance of that fact for present purposes is that in such States, virtually all non-Federal or non-Indian lands are well within the 60-100 mile distance from Federal or Indian lands and would therefore be subject to the "drift factor" limitations described by EPA in the materials quoted above. Indeed, in the States of Utah and Idaho no point on State, local or private land is farther than 20 miles from a Federal or Indian land border.²⁶ Given the ability to "dictate" land use 60 or more miles beyond a particular Class I area, the redesignation process reposes in Federal land managers and Indian governing bodies the authority and power over State, municipal and private land use in virtually the entire States of Utah and Idaho and the entire western halves of the States of Colorado and Wyoming.

Any notion that this redesignation power of the Indian governing bodies and the Federal land managers is theoretical should be dispelled by the recent proposal of the Northern Cheyenne Tribal Council to redesignate the Northern Cheyenne Indian Reservation in Montana to Class I pursuant to EPA's regulations for prevention of significant deterioration. That

²⁶ Although Federal and Indian lands occupy a somewhat smaller percentage of total land area in Wyoming and Colorado than in Utah and Idaho, such holdings in Wyoming and Colorado are heavily concentrated in the western sectors of those two States. *See Appendix C, infra.*

redesignation proposal is the subject of a proposed EPA rule as to which interested parties have been invited to comment. 42 Fed. Reg. 21819 (April 29, 1977). In its discussion of the Cheyenne redesignation proposal EPA notes that:

[I]t is likely that coal-fired power plants and coal conversion facilities would be impacted at least to the extent that their impact on the Class I increment would affect decisions on siting and pollution control equipment.

The analysis submitted with the request predicts the impacts of several energy utilization scenarios on air quality levels on the reservation, and indicates that *facilities located near the reservation would violate the Class I increment within reservation borders. Id.* at 21820. (emphasis supplied).

EPA has expressed its "preliminary judgment" that in proposing redesignation of the Northern Cheyenne Indian Reservation to Class I, the Northern Cheyenne Tribal Council has "not acted arbitrarily or capriciously in their action and have properly considered regional and national interests." *Id.* It is worth noting that although the Northern Cheyenne Indian Reservation is located within the State of Montana, the Governor of the State of Wyoming registered that State's opposition to the Cheyenne redesignation request "because it would predetermine the level of development possible in parts of Northern Wyoming. Several coal conversion plants are being seriously considered in that area. The decision as to whether or not these plants and other possible developments should be allowed is one that ought to be made by the people of Wyoming, not by persons in Montana nor Wash-

ington, D.C.”²⁷ In short, the Northern Cheyenne Tribal Council’s currently pending redesignation proposal is a realistic demonstration of the fact that EPA’s regulations allow Federal land managers and Indian governing bodies to occupy roles in land use planning and decision-making that even EPA acknowledges “[t]raditionally . . . have been considered the prerogative of local and State governments.” (39 Fed. Reg. 31001) (Aug. 27, 1974) (A.167a).

Thus, the powers granted by EPA’s regulations to Federal land managers and Indian governing bodies not only violate the Clean Air Act, but they radically alter the Federal-State relationship governing land use without any legislative authority whatsoever.

²⁷ Letter from Governor Ed Herschler to Mr. Allen Rowland, President, Northern Cheyenne Tribe (Jan. 28, 1977), Appendix B, *infra*.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the regulations held invalid in their entirety as unauthorized by the Clean Air Act. If this Court holds that the nondegradation regulations are authorized by the Clean Air Act, it should declare invalid that portion of the regulations granting redesignation authority to the Federal land managers and Indian governing bodies as being in violation of the Clean Air Act.

Respectfully submitted,

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APPENDIX

APPENDIX A

Relevant excerpts from the Clean Air Act, *as amended*, 42 U.S.C. § 1857 *et seq.*, are as follows:

§ 1857. [§ 101.] Congressional findings; purposes of subchapter

(a) The Congress finds—

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments . . .

(b) The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population. . . .

. . . .

§ 1857c—2. [§ 107.] Air quality control regions—Responsibility of State for air quality; submission of implementation plan

(a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

(b) For purposes of developing and carrying out implementation plans under section 110—

(1) an air quality control region designated under this section before the date of enactment of the Clean Air Amendments of 1970, or a region designated after

such date under subsection (c), shall be an air quality control region; and

(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the Administrator.

§ 1857c—3. [§ 108.] Air quality criteria and control techniques—Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(a)(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) which in his judgment has an adverse effect on public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.

• • • • •

§ 1857c—4. [§ 109.] National primary and secondary ambient air quality standards; promulgation; procedure

(a)(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard

and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b)(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such

air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

§ 1857c—5. [§ 110.] State implementation plans for national primary and secondary ambient air quality standards—Submission to Administrator; time for submission; State procedures; required contents of plans for approval by Administrator; approval of revised plan by Administrator

(a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 1857c—4 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines

that it was adopted after reasonable notice and hearing and that—

(A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan, or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for inter-governmental cooperation, including measures necessary to insure that emissions of air pollu-

tants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 1857h—1 of this title, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 1857c—6 of this title will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within

such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

Extension of period for submission of plan implementing national secondary ambient air quality standard

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to extend 18 months from the date otherwise required for submission of such plan.

Preconditions for preparation and publication by Administrator of proposed regulations setting forth an implementation plan; hearings for proposed regulations; promulgation of regulations by Administrator; transportation regulations study and report; parking surcharge; suspension authority

(c)(1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

* * *

§ 1857c—6. [§ 111.] Standards of performance for new stationary sources—Definitions

(a) For purposes of this section:

(1) The term “standard of performance” means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.

(2) The term “new source” means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term “stationary source” means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term “modification” means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term “owner or operator” means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

Publication and revision by Administrator of list of categories of stationary sources; inclusion of category in list; publication of proposed regulations by Administrator establishing standards for new sources within category; promulgation and revision of standards; differentiation within categories of new sources; issuance of information on pollution control techniques; applicability to new sources owned or operated by United States

(b)(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if he determines it may contribute to the endangerment of public health or welfare.

• • • •

§ 1857d—1. [§ 116.] Retention of State authority

Except as otherwise provided in sections 1857c—10(c), (e), and (f), 1857f—6a, 1857—6c (c)(4), and 1857f—11 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 1857c—6 or section 1857c—7 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

• • • •

§ 1857f. [§ 118.] Control and abatement of air pollution from Federal facilities: compliance of Federal departments, etc., with Federal, State, interstate, and local requirements; exemption by President of any emission source from any executive branch department, etc.; report to Congress

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. . . .

APPENDIX B

**WYOMING
EXECUTIVE DEPARTMENT
CHEYENNE**

ED HERSCHLER, *Governor*

January 28, 1977

Mr. Allen Rowland
President, Northern Cheyenne Tribe
P.O. Box 128
Lame Deer, Montana 89043

Dear Mr. Rowland:

Regarding the Northern Cheyenne Air Quality Redesignation Report and Request, please be advised that the State of Wyoming is opposed to such redesignation because it would pre-determine the level of development possible in parts of Northern Wyoming. Several coal conversion plants are being seriously considered in that area. The decision as to whether or not these plants and other possible developments should be allowed is one that ought to be made by the people of Wyoming, not by persons in Montana nor Washington, D.C.

With our Industrial Siting Act and air quality regulations, we have the mechanisms to insure that the impacts from such projects will be minimized and, through previous decisions and policies, we have demonstrated our determination to enforce these laws.

Yours sincerely,
/s/ ED HERSCHLER
Ed Herschler

EH/alr

cc: Randolph Wood, Department of
Environmental Quality
Environmental Protection Agency
Washington, D.C.

FILED
AP 23 1977

IN THE
SUPREME COURT of the United States

COMMON TERM, 1977

No. 76-529

MONTANA POWER COMPANY, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.,
Respondents.

Sup Nos. 76-528, 76-534, 76-519, 76-603, 76-629

On Petitions for Writs of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

**MOTION OF INTERVENOR RESPONDENTS
SUGGESTING MOOTNESS**

BROOK J. TERRELL
NATHALIE V. BLACK
1525 18th Street, N.W.
Washington, D.C. 20036

Attorneys for Intervenor Respondents

**MOTION OF INTERVENOR RESPONDENTS
SUGGESTING MOOTNESS**

On April 4, 1977, this Court granted petitions for writs of certiorari in the above-captioned proceedings. The order issued on that day limited the questions before the Court to the following:

1. Whether regulations promulgated by the Environmental Protection Agency to prevent the significant deterioration of air quality are authorized by the Clean Air Act;
2. Whether the Clean Air Act permits the Environmental Protection Agency to adopt regulations which grant to federal land managers and Indian governing bodies power to reclassify federal and Indian lands within their jurisdiction.

Intervenor respondents Sierra Club, *et al.*, believe that the recently enacted Amendments to the Clean Air Act, P.L. 95-95, which were signed into law by the President on August 7, 1977, dispose of any doubt as to these two questions. Consequently, the case before this Court is essentially moot. To the extent that any questions might still be raised, they are not of a sufficient consequence to warrant review by this Court and, in any case, should first be considered by the lower court in the light of the new statute.

I

**THE REGULATIONS OF THE
ENVIRONMENTAL PROTECTION AGENCY**

The regulations at issue here were promulgated by the Environmental Protection Agency in December 1974. 39 Fed. Reg. 42509. The promulgation of these regulations was in response to the ruling in *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), affirmed per curiam, 4 ERC 1815, affirmed by an equally divided Court *sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973). That decision found that the policy of preventing signifi-

cant deterioration of existing clean air was part of the Clean Air Act and indeed had been part of that statute even before its amendment in 1970. 344 F. Supp. at 256. The stated purpose of the EPA regulations is the prevention of significant deterioration of air quality—that is, preventing air which is presently cleaner than would be allowed by the national ambient air quality standards adopted by EPA pursuant to the Clean Air Act of 1970, 42 U.S.C. 1857, *et seq.*, from becoming significantly dirtier.

The regulations issued by EPA were immediately challenged by the petitioners now before this Court.¹ The litigation brought before the Court of Appeals for the District of Columbia Circuit pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. 1857h-5(b)(1), raised a number of issues concerning the regulations and their validity, including the two questions before this Court. The Court of Appeals rejected all challenges and found the regulations valid and reasonable in nearly all respects. *Sierra Club v. Environmental Protection Agency*, 540 F. 2d 1114 (1976), set out as an appendix to the Petition for Writs of Certiorari in Nos. 76-529. However, as to the question of the authority of Indian governing bodies and federal land managers to determine the air quality designation of lands under their control, the Court of Appeals found the issue not ripe for review. See Petition for a Writ of Certiorari, No. 76-529, App. A, p. 47a.

Generally, the regulations provide for a system of air quality classifications to limit increases in the level of

¹ Intervenor respondent Sierra Club also challenged the regulations on the ground that they were not fully adequate to carry out their purpose. This challenge was rejected by the Court of Appeals, which found the regulations reasonable, and the Sierra Club's petition for a writ of certiorari was denied by this Court. Order of April 4, 1977, No. 76-617.

two pollutants, sulphur dioxide and particulates, in clean air areas. 40 C.F.R. 52.21(c). Class I, which is the most restrictive, allows only small additional amounts of the two pollutants to be introduced into a clean air area. 40 C.F.R. 52.21(c)(2)(i). Class II allows a considerable additional amount of these two pollutants. Class III would allow pollution levels to rise to the lowest of the national ambient air quality standards. 40 C.F.R. 52.21(c)(2)(ii). All areas of the country were originally designated as Class II by EPA, but States and Indian governing bodies could redesignate lands under their jurisdiction as Classes I or III and federal land managers could redesignate from the existing classification but only to a more restrictive one. 40 C.F.R. 52.21(c)(3).

The regulations also establish a permit system under which major new sources of air pollution are required to demonstrate, prior to construction, that the emissions of sulfur dioxide and particulates which they will produce will not exceed the amounts of these pollutants allowed by the increments applicable to an area which the emissions would affect. 40 C.F.R. 52.21(d).

II

THE CLEAN AIR ACT AMENDMENTS OF 1977

On August 7, 1977, President Carter signed into law extensive amendments to the Clean Air Act, including detailed provisions for the prevention of significant deterioration of air quality. The amendments passed by the Congress, H.R. 6161 (123 Cong. Rec. H8507 (daily edition)), have two main effects on this litigation.

First, they establish detailed rules for preventing significant deterioration of clean air, including (1) a requirement that state implementation plans be developed to prevent significant deterioration of air quality (Sec.

161), (2) the adoption of applicable increments (Sec. 163(b)), (3) provision for the automatic designation of national parks, wilderness areas, and other similar areas as Class I areas where very little additional pollution will be allowed (Sec. 162(a)), (4) permission for States and Indian governing bodies to redesignate other areas (Sec. 164(c)), and (5) procedures for preconstruction review of major new sources of air pollutants (Sec. 165). These provisions are applicable as soon as a state implementation plan is issued for a particular area (Sec. 168(a)).

Second, the 1977 Amendments specifically adopt the present regulations and provide that they shall be in force until a state implementation plan has been developed, except where inconsistent with specific provisions of the bill:

Sec. 168(a). Until such time as an applicable implementation plan is in effect for any area, which plan meets the requirements of this part to prevent significant deterioration of air quality with respect to any air pollutant, applicable regulations under this Act prior to enactment of this part shall remain in effect to prevent significant deterioration of air quality in any such area for any such pollutant except as otherwise provided in subsection (b).

(b) If any regulation in effect prior to enactment of this part to prevent significant deterioration of air quality would be inconsistent with the requirements of section 162(a), section 163(b) or section 164(a), then such regulations shall be deemed amended so as to conform with such requirements. In the case of a facility on which construction was commenced in accordance with this definition after June 1, 1975, and prior to the enactment of the Clean Air Act Amendments of 1977, the review and permitting of such facility shall be in accordance with the regulations for the prevention of significant deteriora-

tion in effect prior to the enactment of the Clean Air Act Amendments of 1977.²

It is readily apparent, from even a cursory comparison of the regulations and the 1977 Amendments, that both the essential structure and underlying philosophy of the regulations were adopted and incorporated in the final statute. Both the regulations and the 1977 Amendments provide for the use of an increment system based on land classifications. Both allow for redesignation by States and Indian governing bodies of the lands within their jurisdiction.³ Both provide for preconstruction review of major new pollution sources to ensure that the applicable pollution increments will not be violated. However, even more important, Section 168 adopts virtually all the regulations for the period prior to the issuance of the implementation plans at which time the statutory provisions become effective.

² The provisions of the 1977 Amendments which immediately amend and supersede the regulations deal with the mandatory Class I areas (Sec. 162(a)), the applicable increments (Sec. 163(b)), and the areas which are initially classified Class II but may be redesignated only to Class I (Sec. 164(a)). In addition, the amendments modify the definition contained in the regulations for the commencement of construction (Sec. 164(b)), a provision which governs which major new sources will be subject to review under the regulations and the statute.

³ The role of the federal land manager has been changed from that of a redesignating authority (40 C.F.R. 52.21(c)(3)(iv)) to one offering recommendations for further designations of Class I lands and determining where certain variances from the statutory standards may, or may not, be permitted (Sec. 164(d), 165). The reason for the change in role is obviously that the statute itself provides for the protection of the most sensitive federal areas by actually making them Class I. Thus, the provision in the regulations which gave the federal land managers authority to redesignate only to a more restrictive classification (40 C.F.R. 52.21(c)(3)(iii), (iv)) and, in this fashion, provide protection for the sensitive lands under their jurisdiction will largely be unnecessary.

III

EFFECT OF THE 1977 CLEAN AIR ACT AMENDMENTS
ON THE PROCEEDINGS BEFORE THIS COURT

It is a matter of basic law that this Court will review a case on the basis of the "law as it now stands, not as it stood when the judgment below was entered." *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972). The law regarding the prevention of significant deterioration of air quality, as it now stands, is the statute signed into law on August 7, 1977. From the date of that statute onward, the questions before this Court are entirely moot. There can be no doubt after that date whether the "regulations promulgated by the Environmental Protection Agency * * * are authorized by the Clean Air Act" (Question 1), or whether the "Act permits the Environmental Protection Agency to adopt regulations which grant to federal land managers and Indian governing bodies powers to reclassify federal and Indian lands within their jurisdiction" (Question 2). During the interim period while the States are modifying their implementation plans to comport with the 1977 Amendments, the statute itself adopts and enacts the regulations with only minor adjustments to make them compatible with the provisions of the 1977 Act. After the plans are adopted, the statute, rather than the EPA regulations, will govern.

Insofar as the regulations applied prior to August 7, 1977, even if we assume *arguendo* that the 1977 Amendments did not constitute a ratification of the regulations as they existed prior to enactment,⁴ intervenor respond-

⁴ We submit that the 1977 Amendments do constitute such a ratification. Congress repeatedly reaffirmed during the consideration of this legislation that the Clean Air Act of 1970 prohibited the significant deterioration of air quality. See, e.g., Clean Air Amendments of 1977, Senate Committee on Environment and Public

ents submit that this case should only be considered by this Court at this time if significant actions were taken under the regulations which, standing alone, would be of sufficient importance to justify the grant of writs of certiorari to consider the two questions presently before the Court. It must be determined whether "[t]he case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969), quoted in *Diffenderfer v. Central Baptist Church*, *supra*, 404 U.S. at 414.

In *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955), this Court considered whether a writ of certiorari should be dismissed because of facts which emerged after it was granted. This Court held that the facts which "must be weighed in the exercise of that 'sound judicial discretion'" are the same as those which govern the grant or denial of petitions for writ of certiorari. *Id.* at 77. The Court explained (*id.* at 79):

In the words of Mr. Chief Justice Taft, speaking for a unanimous Court: "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where

Works, 95th Cong., 1st Sess. 28-29 (1977); Clean Air Act Amendments of 1977, No. 95-294, House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 103-105; 123 Cong. Rec. H8665 (daily edition, August 4, 1977). It also reaffirmed the authority of EPA to issue regulations to enforce this requirement of the 1970 statute. See, e.g., 123 Cong. Rec. H8664-8665 (daily edition, August 4, 1977). Moreover, the 1977 Amendments, by adopting virtually all of the EPA regulations for the interim period before issuance of the state implementation plans, clearly demonstrate Congress' approval of the EPA regulations.

there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393.

In the *Rice* case, the Court cited an impressive list of cases that were dismissed even after full argument. *Id.* at 78.

There can be little doubt that the granting of writs of certiorari would not be justified in the present situation. The regulations have no independent application to actions taken after August 7, 1977. Almost no actions were taken under the regulations prior to that date. Only one area had been redesignated, the redesignation by the Northern Cheyenne Tribe of their reservation as a Class I area. 42 Fed. Reg. 40695. A number of the pollution sources had sought, and been granted, permits but, as far as intervenors are aware, no source had been denied one.⁵

If the issue concerning the justification for this Court's review of this case, based on the present situation, were far more doubtful, we submit that the questions in this case should first be considered by the Court of Appeals in light of the recent statute. Consequently, if this Court does not simply dismiss as moot, we submit that the proper course would be to remand the cases to the Court of Appeals for determination of the effect of the new law on the regulations, as to the period prior to August 7, 1977. The determination of the Court of Appeals could then be considered by this Court to determine whether granting writs of certiorari would be justified.

⁵ A few challenges to the requirement of a permit are pending in the courts.

CONCLUSION

For the reasons stated above, intervenor respondents request that these consolidated proceedings either be dismissed as rendered moot by the passage of the Clean Air Act Amendments of 1977 or be remanded to the Court of Appeals for consideration in the light of the newly enacted legislation.

Respectfully submitted,

BRUCE J. TERRIS
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Attorneys for Intervenor Respondents

AUG 26 1977

Nos. 76-529, 76-585, 76-594, 76-603, 76-619, 76-620

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

MONTANA POWER COMPANY, ET AL., PETITIONERS*v.***UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.**

AMERICAN PETROLEUM INSTITUTE, ET AL., PETITIONERS*v.***UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.***

**ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**MOTION TO DISMISS THE WRITS OF CERTIORARI
AS IMPROVIDENTLY GRANTED OR
TO VACATE AND REMAND**

**WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.****MICHAEL A. JAMES,
Acting General Counsel,
Environmental Protection Agency,
Washington, D.C. 20460.**

* Additional captions appear on reverse side.

INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

ALABAMA POWER COMPANY, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

UTAH POWER AND LIGHT COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

WESTERN ENERGY SUPPLY AND TRANSMISSION
ASSOCIATES, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-529

MONTANA POWER COMPANY, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

No. 76-585

AMERICAN PETROLEUM INSTITUTE, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

No. 76-594

INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

No. 76-603

ALABAMA POWER COMPANY, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

No. 76-619

UTAH POWER AND LIGHT COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

No. 76-620

WESTERN ENERGY SUPPLY AND TRANSMISSION
ASSOCIATES, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION TO DISMISS THE WRITS OF CERTIORARI
AS IMPROVIDENTLY GRANTED OR
TO VACATE AND REMAND

The federal respondents move that the writs of certiorari in these cases be dismissed on the ground that subsequently enacted legislation has rendered the

granting of the writs improvident or, in the alternative, that the judgment be vacated and the case remanded for further consideration in light of the new legislation.

In these cases the court of appeals held that regulations of the Environmental Protection Agency "designed to prevent 'significant deterioration' of air quality in those areas which have air that already is cleaner than the national ambient air quality standards" (A. 43a) are authorized by the Clean Air Act, 42 U.S.C. 1857 *et seq.* (A. 43a-90a).¹ The regulations

¹ The details of the regulations (40 C.F.R. 52.01(d) and (f), and 52.21) (A. 206a, 242a-291a), the history of the proceedings and the basis for the court of appeals' ruling are summarized in the Memorandum for the Federal Respondents addressing the several petitions for a writ of certiorari.

The court of appeals reaffirmed an earlier ruling that the Environmental Protection Agency was required to promulgate such regulations. *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C.), affirmed (C.A.D.C.) (*per curiam*) (Pet. No. 76-529, App. A, p. 9a), affirmed by an equally divided court *sub nom. Fri v. Sierra Club*, 412 U.S. 541.

As to the validity of the particular regulations, the industry petitioners argued in the court of appeals that EPA had exceeded its statutory authority and abused its discretion because the regulations allegedly were unrelated to the effects of adverse air quality, were unworkable and interfered with authority granted to the states under the Act. The court rejected these arguments and rejected as well petitioners' further contentions that the regulations were unconstitutional because they had no rational relationship to the protection of public health, took private property without just compensation and represented an unconstitutionally vague delegation of authority to EPA (Pet. App. A, pp. 34a-44a, 48a-50a). The court further held that the question regarding the authority of Federal Land Managers and Indian governing bodies to

define areas where air quality is better than national air quality standards as Class I, Class II, and Class III, allowing, respectively, the least, more and most deterioration in relation to the national standards. They also provide a procedure for redesignation of the appropriate class by the states, federal land managers and Indian tribes.

At the time of the decision, the Act contained no detailed provisions concerning prevention of significant deterioration. The court of appeals found authority for the regulations to be implied by the language, purpose and legislative history of the Act, especially the 1967 amendment, 81 Stat. 485, and subsequent statements of legislative purpose in the Congress.

On April 4, 1977, this Court granted the petitions for writs of certiorari in these cases limited to the following questions (A. 292a):

1. Whether regulations promulgated by the Environmental Protection Agency to prevent the significant deterioration of air quality are authorized by the Clean Air Act.
2. Whether the Clean Air Act permits the Environmental Protection Agency to adopt regu-

redesignate their lands was not ripe for review (Pet. App. A, pp. 45a-48a). As to the contentions of the petitioners representing environmental groups and individuals, the court held that the regulations were not invalid on the basis that air quality in regions designated class III would deteriorate or on the basis that only two of the six primary air pollutants are covered (Pet. App. A, pp. 29a-34a).

lations which grant to federal land managers and Indian governing bodies power to re-classify federal and Indian lands within their jurisdiction.

On August 7, 1977, the President approved the Clean Air Act Amendments of 1977, Pub. L. 95-95, 91 Stat. 685. Among other things, the 1977 Amendments include in the Clean Air Act for the first time detailed provisions concerning the prevention of significant deterioration of air quality. Section 127(a) of Pub. L. 95-95 (App., *infra*, pp. 1a-25a).

The following provisions of the Amendments ratify the existing regulations by reference and thus eliminate the controversy presented by the first question: (1) New Section 162(a) provides that "All areas which were redesignated as class I under regulations promulgated before [the effective date of the 1977 Amendments] shall be class I areas which may be redesignated" under the provisions of the Amendments (App., *infra*, p. 3a). (2) New Section 168(a) provides that until implementation plans for the prevention of significant deterioration under the Amendments become effective, "applicable regulations under this Act prior to enactment of this part shall remain in effect," except that if such regulations would be inconsistent with specified sections of the new statute, the regulations shall be deemed amended to conform with the requirements of those sections. (3) In addition, Section 168(b) provides that, for facilities on which construction began after June 1, 1975, but prior to the 1977 Amendments, "the review and per-

mitting of such facility shall be in accordance with the regulations for the prevention of significant deterioration in effect prior to the enactment of" the 1977 Amendments. (App., *infra*, pp. 21a-22a).

As to the second question, the regulations relating to the authority of Indian governing bodies are confirmed by new Section 164(c), expressly conferring such authority (App., *infra*, p. 9a). With respect to the regulations authorizing federal land managers to redesignate, however, new Section 164(d) (App., *infra*, pp. 9a-10a) confers only powers of recommendation; no power to redesignate is granted. Thus the regulations as to federal land managers will have to be withdrawn.

In light of these legislative developments, we submit that the questions upon which this Court granted certiorari are no longer appropriate for its consideration. The law under which the Environmental Protection Agency's powers were to be tested has been significantly amended. There remains no controversy as to the authority of the Environmental Protection Agency to adopt, under the Clean Air Act, regulations for the prevention of significant deterioration in air quality, and providing for classification of air quality within Indian reservations by Indian governing bodies. On the other hand, Congress has now determined that federal land managers are to have different powers and the Agency accordingly must revise its regulations to conform with the statute.

In these circumstances, two possible dispositions should be considered. The court could simply dismiss the writs on the ground that the subsequent legislation has rendered the grants improvident. Cf. *Cook v. Hudson*, 429 U.S. 165; *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70. Or the court could vacate the judgment of the court of appeals and remand the cases for further consideration of the questions on which certiorari was granted in light of the 1977 Amendments. Cf. *Environmental Protection Agency v. Brown*, Nos. 75-909, 75-960, 75-1050 and 75-1055, decided May 2, 1977; *Philadelphia v. New Jersey*, No. 75-1150, decided February 23, 1977, *Difenderfer v. Central Baptist Church*, 404 U.S. 412.

We believe that little purpose would be served by the latter course. This Court granted certiorari on only two questions, thus leaving the court of appeals' rejection of petitioners' other challenges to the regulations (see note 1, *supra*, pp. 3-4) undisturbed. While the controversy as to the issues on which certiorari was granted has been effectively mooted by the new legislation, the regulations themselves, as sustained by the court of appeals, remain in effect except to the extent superseded by the 1977 Amendments. The questions on which certiorari was granted, therefore, are no longer "special and important" (Rule 19 of this Court's Rules; see *Rice v. Sioux City Memorial Park Cemetery*, *supra*, 349 U.S. at 73-74), for they have no prospective significance and cannot arise again. Accordingly, dismissal of the writs as improvi-

dently granted is the appropriate disposition of these cases.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MICHAEL A. JAMES,
*Acting General Counsel,
Environmental Protection Agency.*

AUGUST 1977.

APPENDIX

PREVENTION OF SIGNIFICANT DETERIORATION

SEC. 127. (a) Title I of the Clean Air Act is amended by adding the following new part at the end thereof:

"PART C—PREVENTION OF SIGNIFICANT DETERIORATION OF AIR QUALITY

"SUBPART I

"PURPOSES

"SEC. 160. The purposes of this part are as follows:

"(1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air, notwithstanding attainment and maintenance of all national ambient air quality standards;

"(2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;

"(3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;

"(4) to assure that emissions from any source in any State will not interfere with any portion

of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and

“(5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

“PLAN REQUIREMENTS

“SEC. 161. In accordance with the policy of section 101(b)(1), each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) identified pursuant to section 107(d)(1)(D) or (E).

“INITIAL CLASSIFICATIONS

“SEC. 162. (a) Upon the enactment of this part, all—

“(1) international parks,

“(2) national wilderness areas which exceed 5,000 acres in size,

“(3) national memorial parks which exceed 5,000 acres in size, and

“(4) national parks which exceed six thousand acres in size and which are in existence on the date of enactment of the Clean Air Act Amendments of 1977 shall be class I areas and

may not be redesignated. All areas which were redesignated as class I under regulations promulgated before such date of enactment shall be class I areas which may be redesignated as provided in this part.

“(b) All areas in such State identified pursuant to section 107(d)(1)(D) or (E) which are not established as class I under subsection (a) shall be class II areas unless redesignated under section 164.

“INCREMENTS AND CEILINGS

“SEC. 163. (a) In the case of sulfur oxide and particulate matter, each applicable implementation plan shall contain measures assuring that maximum allowable increases over baseline concentrations of, and maximum allowable concentrations of, such pollutant shall not be exceeded. In the case of any maximum allowable increase (except an allowable increase specified under 165(d)(2)(C)(iv) for a pollutant based on concentrations permitted under national ambient air quality standards for any period other than an annual period, such regulations shall permit such maximum allowable increase to be exceeded during one such period per year.

“(b)(1) For any class I area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

4a

"Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	5
Twenty-four-hour maximum	10
Sulfur dioxide:	
Annual arithmetic mean	2
Twenty-four-hour maximum	5
Three-hour maximum	25

"(2) For any class II area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

"Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
Twenty-four-hour maximum	91
Three-hour maximum	512

"(3) For any class III area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

"Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	37
Twenty-four-hour maximum	75
Sulfur dioxide:	
Annual arithmetic mean	40
Twenty-four-hour maximum	182
Three-hour maximum	700

5a

"(4) The maximum allowable concentration of any air pollutant in any area to which this part applies shall not exceed a concentration for such pollutant for each period of exposure equal to—

"(A) the concentration permitted under the national secondary ambient air quality standard, or

"(B) the concentration permitted under the national primary ambient air quality standard,

whichever concentration is lowest for such pollutant for such period of exposure.

"(c) (1) In the case of any State which has a plan approved by the Administrator for purposes of carrying out this part, the Governor of such State may, after notice and opportunity for public hearing, issue orders or promulgate rules providing that for purposes of determining compliance with the maximum allowable increases in ambient concentrations of an air pollutant, the following concentrations of such pollutants shall not be taken into account:

"(A) concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, or natural gas, or both, by reason of an order which is in effect under the provisions of sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any subsequent legislation which supersedes such provisions) over the emissions from such sources before the effective date of such order.

“(B) the concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from using natural gas by reason of a natural gas curtailment pursuant to a natural gas curtailment plan in effect pursuant to the Federal Power Act over the emissions from such sources before the effective date of such plan,

“(C) concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities, and

“(D) the increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration determined in accordance with section 169(4).

“(2) No action taken with respect to a source under paragraph (1)(A) or (1)(B) shall apply more than five years after the effective date of the order referred to in paragraph (1)(A) or the plan referred to in paragraph (1)(B), whichever is applicable. If both such order and plan are applicable, no such action shall apply more than five years after the later of such effective dates.

“(3) No action under this subsection shall take effect unless the Governor submits the order or rule providing for such exclusion to the Administrator and the Administrator determines that such order or rule is in compliance with the provisions of this subsection.

“AREA REDESIGNATION

“SEC. 164. (a) Except as otherwise provided under subsection (c), a State may redesignate such areas as it deems appropriate as class I areas. The following areas may be redesignated only as class I or II:

“(1) an area which exceeds ten thousand acres in size and is a national monument, a national primitive area, a national preserve, a national recreation area, a national wild and scenic river, a national wildlife refuge, a national lakeshore or seashore, and

“(2) a national park or national wilderness area established after the date of enactment of this Act which exceeds ten thousand acres in size.

Any area (other than an area referred to in paragraph (1) or (2) or an area established as class I under the first sentence of section 162(a)) may be redesignated by the State as class III of—

“(A) such redesignation has been specifically approved by the Governor of the State, after consultation with the appropriate Committees of the legislature if it is in session or with the leadership of the legislature if it is not in session (unless State law provides that such redesignation must be specifically approved by State legislation) and if general purpose units of local government representing a majority of the residents of the area so redesignated enact legislation (including for such units of local government resolutions where appropriate) concurring in the State's redesignation;

“(B) such redesignation will not cause, or contribute to, concentrations of any air pollutant which exceed any maximum allowable increase or maximum allowable concentration permitted under the classification of any other area; and

“(C) such redesignation otherwise meets the requirements of this part.

Subparagraph (A) of this paragraph shall not apply to area redesignations by Indian tribes.

“(b) (1) (A) Prior to redesignation of any area under this part, notice shall be afforded and public hearings shall be conducted in areas proposed to be redesignated and in areas which may be affected by the proposed redesignation. Prior to any such public hearing a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation shall be prepared and made available for public inspection and prior to any such redesignation, the description and analysis of such effects shall be reviewed and examined by the redesignating authorities.

“(B) Prior to the issuance of notice under subparagraph (A) respecting the redesignation of any area under this subsection, if such area includes any Federal lands, the State shall provide written notice to the appropriate Federal land manager and afford adequate opportunity (but not in excess of 60 days) to confer with the State respecting the intended notice of redesignation and to submit written comments and recommendations with respect to such intended notice of redesignation. In redesignating any area under this

section with respect to which any Federal land manager has submitted written comments and recommendations, the State shall publish a list of any inconsistency between such redesignation and such recommendations and an explanation of such inconsistency (together with the reasons for making such redesignation against the recommendation of the Federal land manager).

“(C) The Administrator shall promulgate regulations not later than six months after date of enactment of this part, to assure, insofar as practicable, that prior to any public hearing on redesignation of any area, there shall be available for public inspection any specific plans for any new or modified major emitting facility which may be permitted to be constructed and operated only if the area in question is designated or redesignated as class III.

“(2) The Administrator may disapprove the redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of this section. If any such disapproval occurs, the classification of the area shall be that which was in effect prior to the redesignation which was disapproved.

“(c) Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body. Such Indian governing body shall be subject in all respect to the provisions of subsection (e).

“(d) The Federal Land Manager shall review all national monuments, primitive areas, and national

preserves, and shall recommend any appropriate areas for redesignation as class I where air quality related values are important attributes of the area. The Federal Land Manager shall report such recommendations, within supporting analysis, to the Congress and the affected States within one year after enactment of this section. The Federal Land Manager shall consult with the appropriate States before making such recommendations.

“(e) If any State affected by the redesignation of area by an Indian tribe or any Indian tribe affected by the redesignation of an area by a State disagrees with such redesignation of any area, or if a permit is proposed to be issue for any new major emitting facility proposed for construction in any State which the Governor of an affected State or governing body of an affected Indian tribe determines will cause or contribute to a cumulative change in air quality in excess of that allowed in this part within the affected State or tribal reservation, the Governor or Indian ruling body may request the Administrator to enter into negotiations with the parties involved to resolve such dispute. If requested by any State or Indian tribe involved, the Administrator shall make a recommendation to resolve the dispute and protect the air quality related values of the lands involved. If the parties involved do not reach agreement, the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan. In resolving such

disputes relating to area redesignation, the Administrator shall consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area.

“PRECONSTRUCTION REQUIREMENTS

“SEC. 165. (a) No major emitting facility on which construction is commenced after the date of the enactment of this part, may be constructed in any area to which this part applies unless—

“(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

“(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

“(3) the owner or operator of such facility demonstrates that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time

per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this Act;

"(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this Act emitted from, or which results from, such facility;

"(5) the provisions of subsection (d) with respect to protection of class I areas have been complied with for such facility;

"(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

"(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

"(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 111 of this Act has been promulgated subsequent to enactment of the Clean Air Act Amendments of 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

"(b) The demonstration pertaining to maximum allowable increases required under subsection (a) (3)

shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in existence on the date of enactment of the Clean Air Act Amendments of 1977, whose actual allowable emissions of air pollutants, after compliance with subsection (a) (4), will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides, will not contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

"(c) Any completed permit application under section 110 for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

"(d) (1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to the consideration of such permit.

"(2) (A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I area which may be affected by emissions from the proposed facility.

"(B) The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative re-

sponsibility to protect the air quality related values (including visibility) of any such lands within a class I area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

“(C)(i) In any case where the Federal official charged with direct responsibility for management of any lands within a class I area or the Federal Land Manager of such lands, or the Administrator, or the Governor of an adjacent State containing such a class I area files a notice alleging that emissions from a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

“(ii) In any case where the Federal Land Manager demonstrates to the satisfaction of the State that the emissions from such facility will have an adverse impact on the air quality-related values (including visibility) of such lands, notwithstanding the fact that the change in air quality resulting from emissions from such facility will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area, a permit shall not be issued.

“(iii) In any case where the owner or operator of such facility demonstrates to the satisfaction of the Federal Land Manager, and the Federal Land

Manager so certifies, that the emissions from such facility will have no adverse impact on the air quality related values of such lands (including visibility), notwithstanding the fact that the change in air quality resulting from emissions from such facility will cause or contribute to concentrations, which exceed the maximum allowable increases for class I areas, the State may issue a permit.

“(iv) In the case of a permit issued pursuant to clause (iii), such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides and particulates from such sources together with all other sources, will not exceed the following maximum allowable increases over the baseline concentration for such pollutants:

	Maximum allowable increase (in micrograms per cubic meter)
“Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
Twenty-four-hour maximum	91
Three-hour maximum	325

“(D)(i) In any case where the owner or operator of a proposed major emitting facility who has been denied a certification under subparagraph (C)(iii) demonstrates to the satisfaction of the Governor, after notice and public hearing, and the Governor finds, that the facility cannot be constructed by reason of any maximum allowable increase for sulfur dioxide

for periods of twenty-four hours or less applicable to any class I area and, in the case of Federal mandatory class I areas, that a variance under this clause will not adversely affect the air quality related values of the area (including visibility), the Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may grant a variance from such maximum allowable increase. If such variance is granted, a permit may be issued to such source pursuant to the requirements of this subparagraph.

"(ii) In any case in which the Governor recommends a variance under this subparagraph in which the Federal Land Manager does not concur, the recommendations of the Governor and the Federal Land Manager shall be transmitted to the President. The President may approve the Governor's recommendation if he finds that such variance is in the national interest. No Presidential finding shall be reviewable in any court. The variance shall take effect if the President approves the Governor's recommendations. The President shall approve or disapprove such recommendation within ninety days after his receipt of the recommendations of the Governor and the Federal Land Manager.

"(iii) In the case of a permit issued pursuant to this subparagraph, such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides from such source, together with all other sources, will exceed the otherwise applicable maximum allow-

able increases for a period of exposure of twenty-four hours or less on not more than eighteen days during any annual period and that during such day such emissions will not exceed the following maximum allowable increases over the baseline concentration for such pollutant:

MAXIMUM ALLOWABLE INCREASE
[In micrograms per cubic meter]

Period of exposure	Low terrain areas	High terrain areas
24-hr maximum	36	62
3-hr maximum	130	221

"(e)(1) The review provided for in subsection (a) shall be preceded by an analysis in accordance with regulations of the Administrator, promulgated under this subsection, which may be conducted by the State (or any general purpose unit of local government) or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this Act which will be emitted from such facility.

"(2) Effective one year after date of enactment of this part, the analysis required by this subsection shall include continuous air quality monitoring data gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part. Such data shall

be gathered over a period of one calendar year preceding the date of application for a permit under this part unless the State, in accordance with regulations promulgated by the Administrator, determines that a complete and adequate analysis for such purposes may be accomplished in a shorter period. The results of such analysis shall be available at the time of the public hearing on the application for such permit.

"(3) The Administrator shall within six months after the date of enactment of this part promulgate regulations respecting the analysis required under this subsection which regulations—

"(A) shall not require the use of any automatic or uniform buffer zone or zones,

"(B) shall require an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated under this Act which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility, the degree of continuous emission reduction which could be achieved by such facility, and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region,

"(C) shall require the results of such analysis shall be available at the time of the public hearing on the application for such permit, and

"(D) shall specify with reasonable particularity each air quality model or models to be

used under specified sets of conditions for purposes of this part.

Any model or models designated under such regulations may be adjusted upon a determination, after notice and opportunity for public hearing, by the Administrator that such adjustment is necessary to take into account unique terrain or meteorological characteristics of an area potentially affected by emissions from a source applying for a permit required under this part.

"OTHER POLLUTANTS

"SEC. 166. (a) In the case of the pollutants hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides, the Administrator shall conduct a study and not later than two years after the date of enactment of this part, promulgate regulations to prevent the significant deterioration of air quality which would result from the emissions of such pollutants. In the case of pollutants for which national ambient air quality standards are promulgated after the date of the enactment of this part, he shall promulgate such regulations not more than 2 years after the date of promulgation of such standards.

"(b) Regulations referred to in subsection (a) shall become effective one year after the date of promulgation. Within 21 months after such date of promulgation such plan revision shall be submitted to the Administrator who shall approve or disapprove the plan within 25 months after such date or promulgation in the same manner as required under section 110.

“(c) Such regulations shall provide specific numerical measures against which permit applications may be evaluated, a framework for stimulating improved control technology, protection of air quality values, and fulfill the goals and purposes set forth in section 101 and section 160.

“(d) The regulations of the Administrator under subsection (a) shall provide specific measures at least as effective as the increments established in section 163 to fulfill such goals and purposes, and may contain air quality increments, emission density requirements, or other measures.

“(e) With respect to any air pollutant for which a national ambient air quality standard is established other than sulfur oxides or particulate matter, an area classification plan shall not be required under this section if the implementation plan adopted by the State and submitted for the Administrator’s approval or promulgated by the Administrator under section 110(c) contains other provisions which when considered as a whole, the Administrator finds will carry out the purposes in section 160 at least as effectively as an area classification plan for such pollutant. Such other provisions referred to in the preceding sentence need not require the establishment of maximum allowable increases with respect to such pollutant for any area to which this section applies.

“ENFORCEMENT

“SEC. 167. The Administrator shall, and a State may, take such measures, including issuance of an

order, or seeking injunctive relief, as necessary to prevent the construction of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed in any area included in the list promulgated pursuant to paragraph (1)(D) or (E) of subsection (d) of section 107 of this Act and which is not subject to an implementation plan which meets the requirements of this part.

“PERIOD BEFORE PLAN APPROVAL

“SEC. 168. (a) Until such time as an applicable implementation plan is in effect for any area, which plan meets the requirements of this part to prevent significant deterioration of air quality with respect to any air pollutant, applicable regulations under this Act prior to enactment of this part shall remain in effect to prevent significant deterioration of air quality in any such area for any such pollutant except as otherwise provided in subsection (b).

“(b) If any regulation in effect prior to enactment of this part to prevent significant deterioration of air quality would be inconsistent with the requirements of section 162(a), section 163(b) or section 164(a), then such regulations shall be deemed amended so as to conform with such requirements. In the case of a facility on which construction was commenced in accordance with this definition after June 1, 1975, and prior to the enactment of the Clean Air Act Amendments of 1977, the review and permitting

of such facility shall be in accordance with the regulations for the prevention of significant deterioration in effect prior to the enactment of the Clean Air Act Amendments of 1977.

"DEFINITIONS

"SEC. 169. For purposes of this part—

"(1) The term 'major emitting facility' means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than two hundred and fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing

facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

"(2) (A) The term 'commenced' as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

"(B) The term 'necessary preconstruction approvals or permits' means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

"(3) The term 'best available control technology' means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this Act emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy,

environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of 'best available control technology' result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 111 or 112 of this Act.

"(4) The term 'baseline concentration' means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part."

(b) Within one year from the date of enactment of this Act the Administrator shall report to the Congress

on the consequences of that portion of the definition of "major emitting facility" under the amendment made by subsection (a) which applies to facilities with the potential to emit two hundred and fifty tons per year or more. Such study shall examine the type of facilities covered, the air quality benefits of including such facilities, and the administrative aspect of regulating such facilities.

(c) Not later than one year after the date of enactment of this Act, the Administrator shall publish a guidance document to assist the States in carrying out their functions under part C of title I of the Clean Air Act (relating to prevention of significant deterioration of air quality) with respect to pollutants, other than sulfur oxides and particulates, for which national ambient air quality standards are promulgated. Such guidance document shall include recommended strategies for controlling photochemical oxidants on a regional or multistate basis for the purpose of implementing part C and section 110 of such Act.

(d) Not later than two years after the date of enactment of this Act, the Administrator shall complete a study and report to the Congress on the progress made in carrying out part C of title I of the Clean Air Act (relating to significant deterioration of air quality) and the problems associated with carrying out such section, including recommendations for legislative changes necessary to implement strategies for controlling photochemical oxidants on a regional or multistate basis.

Supreme Court, U. S.
FILED

SEP 13 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 76-529

MONTANA POWER COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
et al.,
Respondents.

and Nos. 76-585, 76-594, 76-603, 76-619, 76-620

On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**RESPONSE BY PETITIONERS IN NOS. 76-529,
76-594 AND 76-603 TO MOTION TO DISMISS
THE WRITS OF CERTIORARI AS IMPROVIDENTLY
GRANTED OR TO VACATE AND REMAND AND TO
MOTION OF INTERVENOR RESPONDENTS
SUGGESTING MOOTNESS**

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MOTION OF INTERVENOR RESPONDENTS
SUGGESTING MOOTNESS**

This Court granted the petitions for writ of certiorari
and consolidated the cases, on April 4, 1977, to consider
the following questions:

1. Whether regulations promulgated by the Environmental Protection Agency to prevent the significant deterioration of air quality are authorized by the Clean Air Act?

2. Whether the Clean Air Act permits the Environmental Protection Agency to adopt regulations which grant to Federal land managers and Indian governing bodies power to reclassify Federal and Indian lands within their jurisdiction?

Petitioners filed their briefs on the merits on or before May 19, 1977, within the time allowed by the Court's Rules without extension. Respondents' time in which to file their briefs on the merits was extended by the Clerk until August 22, 1977.

Instead of filing briefs on the merits, however, respondents filed the motions to which this response is directed. The Motion of Intervenor Respondents Suggesting Mootness was filed on August 22, 1977, and the Government's Motion to Dismiss the Writs of Certiorari as Improvidently Granted or to Vacate and Remand was filed on August 26, 1977. For the reasons stated below, we urge that those motions be denied and that the Court proceed to hear and decide these consolidated cases.*

Respondents do not attempt, in their motions, to refute the demonstration in petitioners' briefs that EPA's significant deterioration regulations are not authorized by the Clean Air Act as it read when those regulations were issued and when they were upheld by the Court of Appeals, and thus that the court below erred in holding that they were so authorized. Respondents contend in essence, however, that the regulations have been ratified by the Congress in enacting the Clean Air Act Amend-

* Pursuant to another motion by the intervenor respondents, the Clerk has allowed them 30 days after the Court acts upon their motion suggesting mootness in which to file their brief on the merits.

ments of 1977 (P.L. 95-95), which was approved by the President on August 7, 1977.

It is true that Section 127(a) of the 1977 Amendments, which is set forth in the Appendix to the Government's motion, amends Title I of the Clean Air Act to add a new Part C setting forth detailed provisions (§§ 160-169 of the Act as so amended) relating to the prevention of significant deterioration of air quality. Even assuming that those provisions are constitutional, however, they do not immediately supersede EPA's regulations or otherwise generally have immediate effect. Rather, Section 168 of the amended Act provides that:

"(a) Until such time as an applicable implementation plan is in effect for any area, which plan meets the requirements of this part to prevent significant deterioration of air quality with respect to any air pollutant, applicable regulations under this Act prior to enactment of this part shall remain in effect to prevent significant deterioration of air quality in any such area for any such pollutant except as otherwise provided in subsection (b).

"(b) If any regulation in effect prior to enactment of this part to prevent significant deterioration of air quality would be inconsistent with the requirements of section 162(a), section 163(b) or section 164(a), then such regulations shall be deemed amended so as to conform with such requirements. In the case of a facility on which construction was commenced in accordance with this definition after June 1, 1975, and prior to the enactment of the Clean Air Act Amendments of 1977, the review and permitting of such facility shall be in accordance with the regulations for the prevention of significant deterioration in effect prior to the enactment of the Clean Air Act Amendments of 1977."

Hence, until such time as a State properly adopts an "applicable implementation plan . . . which meets the

requirements of" the 1977 Amendments, the areas within that State will not be subject to any requirements for the prevention of significant deterioration unless there are "applicable regulations under [the Clean Air] Act prior to enactment of this part to prevent significant deterioration of air quality in any such area" Of course, the basic issue on the merits in these cases is whether, under the Clean Air Act "prior to enactment of the" 1977 Amendments, there validly could be any "applicable regulations . . . to prevent significant deterioration of air quality," and the second question before the Court is whether such regulations, even if otherwise valid, could validly include the provisions regarding reclassification of Federal and Indian lands.

We do not believe that it is by any means so clear as respondents seem to assume, therefore, that the Congress has ratified EPA's regulations so as to moot any arguable issue concerning their validity. And, while the "Congress may of course do by ratification what it might have authorized," the legislation claimed to have effected such ratification "must plainly show a purpose to bestow the precise authority which is claimed." *Ex Parte Endo*, 323 U.S. 283, 303 n. 24 (1944); accord, *Greene v. McElroy*, 360 U.S. 474, 505 n. 30 (1959).

Some further indication that the 1977 Amendments were not intended in effect to decide the issues before this Court in these cases is afforded by the savings provisions in Section 406 of those Amendments, which are set forth in full in the Appendix hereto. Section 406(a) provides in part that "[n]o suit, action, or other proceeding lawfully commenced . . . against the Administrator . . . in his official capacity or in relation to the discharge of his official duties under the Clean Air Act, as in effect immediately prior to the date of enactment of this Act shall abate by reason of the taking effect of the amendments made by this Act." (Emphasis added.) Respond-

ents' motions appear to amount in effect to a request that the Court abate these proceedings, which concern the validity of an action which the Administrator of EPA took in his official capacity under the Clean Air Act "as in effect immediately prior to the date of enactment of" the 1977 Amendments, "by reason of the taking effect of" those Amendments.

Furthermore, Section 406(b) provides in part that "[a]ll rules, regulations . . . , or other actions *duly* issued, made or taken by or pursuant to the Clean Air Act as in effect immediately prior to the date of enactment of this Act . . . shall continue in full force and effect after the date of enactment of this Act until modified or rescinded in accordance with the Clean Air Act as amended by this Act." (Emphasis added.) If EPA's significant deterioration regulations were not "duly issued, made or taken by or pursuant to the Clean Air Act as in effect immediately prior to the date of enactment of" the 1977 Amendments, but rather were contrary to those statutory provisions as petitioners have demonstrated in their briefs on the merits, those regulations are not saved by Section 406(b).

We do not mean to suggest to the Court that respondents may not have arguments to support the proposition that EPA's regulations have been ratified by the 1977 Amendments. We have sought only to show that there also are arguments to the contrary, so that respondents' bare assertions that ratification has occurred should not be accepted by the Court prior to full briefing and oral argument of that contention. Indeed, the ratification contention is simply another ground which, if sound, would support the validity of EPA's regulations, and thus most appropriately could be included in respondents' briefs on the merits together with any other contentions they may have as to why those regulations are valid.

We recognize that, under the statutory scheme adopted in the 1977 Amendments, revised State implementation plans which meet "the requirements of this part to prevent significant deterioration of air quality" eventually will be adopted. A very substantial period will elapse, however, before that point is reached. Under Section 406 (d) (2) of the 1977 Amendments, a "State required to revise its applicable implementation plan by reason of any amendment made by this Act" has the "later of" one year after the enactment of the 1977 Amendments or nine months after the promulgation by EPA "of any regulations under an amendment made by this Act which are necessary for the approval of such plan revision," in which to submit to EPA its revised implementation plan. Section 161 of the amended Clean Air Act requires the promulgation by EPA of regulations regarding "emission limitations and such other measures as may be necessary" to be included in "each applicable implementation plan" for the prevention of significant deterioration in accordance with the amended Act. Hence, the deadline for submitting revised State plans could be much more than a year after enactment of the 1977 Amendments, depending upon when EPA promulgates the necessary regulations. If the validity of such regulations should be litigated, substantial additional delay could be involved.

Moreover, submission of revised State implementation plans will not end the matter. Upon submission, they are subject to review and possible amendment by EPA under Section 110 of the Clean Air Act,* and EPA's actions in that regard also could be subject to litigation. Any litigation in regard to such matters could include issues as to the constitutionality of the significant deterioration provisions of the 1977 Amendments as well

* Section 110 has been amended in some respects by Sections 107 and 108 of the 1977 Amendments, but the basic procedures under which State implementation plans and revisions thereof are subject to review and revision by EPA have not been changed.

as issues as to compliance with those provisions. In short, while no one can know at this time when each of the 50 States will have a valid implementation plan which meets the requirements of the 1977 Amendments, several years could well elapse before that occurs, even assuming that no constitutional problems will be involved.

Accordingly, the issues before the Court regarding the validity of EPA's existing regulations (including the issue as to whether those regulations have been ratified) retain very substantial importance. If the Court should conclude that those regulations are not valid, a major emitting facility on which construction is commenced prior to the adoption of a valid and applicable State implementation plan will not be subject to any requirements regarding the prevention of significant deterioration. In view of the continued viability and importance of the issues before the Court in these cases, the Court should neither regard those issues as moot nor dismiss the writs of certiorari as improvidently granted, and should proceed to a decision on the merits after briefing has been completed and oral argument has been heard.

Respondents also suggest, as an alternative, that the Court remand these cases to the Court of Appeals for further consideration in light of the 1977 Amendments. We submit, however, that such a course makes no sense at all, as the Government virtually concedes (Motion, at 7). Insofar as we are aware, no one contends that the 1977 Amendments provide an additional ground for arguing that EPA's existing regulations were or are invalid. And, since the Court of Appeals already has held that those regulations are valid, any views that it might express on such a remand regarding the effect of the 1977 Amendments would be pure *dicta* amounting in effect to an advisory opinion. As we see the matter, the only situation in which it would be appropriate to remand these cases to the Court of Appeals for consideration in

the light of the 1977 Amendments would be after this Court decides that EPA's regulations were not authorized by the Clean Air Act prior to those Amendments. In that circumstance, the Court possibly might prefer to reverse the decision below and remand for consideration by the Court of Appeals of respondents' ratification contention, although we do not urge that course and believe that the Court should decide all the issues, including ratification, now that these cases are before it.

If the Court should agree with respondents' contention that enactment of the 1977 Amendments has mooted the issues in these cases and that "no controversy" remains (Government Motion, at 6), then the Court should follow its "established practice . . . to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear*, 340 U.S. 36, 39 (1950). If that is done, "the rights of all parties are preserved" and "none is prejudiced by a decision which in the statutory scheme was only preliminary" (*id.*, at 40), and which, in these cases at least, may well be erroneous. Even if the 1977 Amendments have ratified EPA's regulations, situations may arise in which the validity of those regulations under the Clean Air Act as it read prior to those Amendments could be significant.

If the "ratified" regulations should be applied to prevent use of facilities on which construction commenced between June 1, 1975 and the date of enactment of the 1977 Amendments, for example, the constitutional validity of that action could depend upon whether or not the regulations were valid prior to such "ratification." If the regulations were invalid prior to "ratification," the 1977 Amendments could hardly be regarded as merely "a curative statute aptly designed to remedy mistakes and defects in the administration of justice where the remedy can be applied without injustice," *Graham & Foster v. Goodcell*, 282 U.S. 409, 429 (1931), but rather

would appear to constitute a retroactive deprivation of property rights without compensation and without due process of law. See, e.g., *Forbes Boat Line v. Board of Commrs.*, 258 U.S. 338 (1922). In addition, since the time at which construction "commenced" for purposes of the amended Act depends in part upon when "all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws and regulations" have been obtained (§ 169(2) of the amended Act), the validity of the regulations prior to the presumed ratification could be important in that regard. If those regulations were invalid, the preconstruction permit or approval which they required in terms would not have been "necessary" prior to enactment of the 1977 Amendments even if those regulations otherwise would have been applicable.

Consequently, if this Court does not proceed to hear and decide these cases on the merits, it should reverse or vacate the judgment of the Court of Appeals and remand the case with directions to dismiss the proceedings. For the reasons which we have stated, however, we urge the Court to hear and decide these cases on the merits.

Respectfully submitted,

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 INDIANAPOLIS POWER & LIGHT COMPANY
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APPENDIX

SAVING PROVISION ; EFFECTIVE DATES

SEC. 406. (a) No suit, action, or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under the Clean Air Act, as in effect immediately prior to the date of enactment of this Act shall abate by reason of the taking effect of the amendments made by this Act. The court may, on its own motion or that of any party made at any time within twelve months after such taking effect, allow the same to be maintained by or against the Administrator or such officer or employee.

(b) All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to the Clean Air Act as in effect immediately prior to the date of enactment of this Act, and pertaining to any functions, powers, requirements, and duties under the Clean Air Act, as in effect immediately prior to the date of enactment of this Act, and not suspended by the Administrator or the courts, shall continue in full force and effect after the date of enactment of this Act until modified or rescinded in accordance with the Clean Air Act as amended by this Act.

(c) Nothing in this Act nor any action taken pursuant to this Act shall in any way affect any requirement of an approved implementation plan in effect under section 110 of this Act or any other provision of the Act in effect under the Clean Air Act before the date of enactment of this section until modified or rescinded in accordance with the Clean Air Act as amended by this Act.

(d) (1) Except as otherwise expressly provided, the amendments made by this Act shall be effective on date of enactment.

(2) Except as otherwise expressly provided, each State required to revise its applicable implementation plan by reason of any amendment made by this Act shall adopt and submit to the Administrator of the Environmental Protection Administration such plan revision before the later of the date—

(A) one year after the date of enactment of this Act, or

(B) nine months after the date of promulgation by the Administrator of the Environmental Protection Administration of any regulations under an amendment made by this Act which are necessary for the approval of such plan revision.

IN THE
Supreme Court of the United States

Supreme Court, U. S.
FILED

OCTOBER TERM, 1977

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v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

No. 76-585

AMERICAN PETROLEUM INSTITUTE, ET AL., *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION
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No. 76-594

INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL.,
Petitioners

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No. 76-603

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UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

No. 76-619

UTAH POWER AND LIGHT COMPANY, ET AL., *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION
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No. 76-620

WESTERN ENERGY SUPPLY AND TRANSMISSION
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v.

UNITED STATES ENVIRONMENTAL PROTECTION
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On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

PETITIONERS IN NO. 76-619

**RESPONSE TO MOTION TO DISMISS THE WRITS
OF CERTIORARI AS IMPROVIDENTLY GRANTED OR
TO VACATE AND REMAND AND TO MOTION OF
INTERVENOR RESPONDENTS SUGGESTING
MOOTNESS**

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**RESPONSE TO MOTION TO DISMISS THE WRITS
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INTERVENOR RESPONDENTS SUGGESTING
MOOTNESS**

Petitions for writs of certiorari were granted by the Court on April 4, 1977, to determine whether the prevention of deterioration regulations promulgated by the Environmental Protection Agency were authorized by the Clean Air Act and, if so, whether such regula-

tions could validly include the provisions concerning reclassification of Federal and Indian lands. Subsequent to the filing of petitioners' briefs on the merits on or before May 19, 1977, amendments to the Clean Air Act were enacted. Pub. L. 95-95, 91 Stat. 685 (Aug. 7, 1977) (hereinafter 1977 Amendments). Respondents, the Environmental Protection Agency, *et al.* (EPA), and intervenor respondents, Sierra Club, *et al.*, now move to dismiss these consolidated cases. The intervenor respondents contend that the amendments "dispose of any doubt as to [the two issues before the Court]. Consequently, [the intervenor respondents argue] the case before this Court is *essentially* moot" (Motion of Intervenor Respondents Suggesting Mootness, p. 1, emphasis supplied). The federal respondents argue that "the controversy as to the issues on which certiorari was granted has been effectively mooted by the new legislation. . ." (Motion to Dismiss the Writs of Certiorari As Improvidently Granted Or to Vacate and Remand, p. 7) (hereinafter EPA Motion to Dismiss). For the reasons set forth below we urge the Court to deny both motions and to hear and decide these consolidated cases. We think it clear that the issues before this Court are *not* moot. Events have occurred and continue to occur under the regulations as promulgated and presented before this Court that demonstrate that there remains a "live" controversy. Thus, it remains of continuing importance that the Court decide the merits of the issues presented.¹

¹ Petitioners in Nos. 76-529, 76-594 and 76-603 have filed with the Court a response to respondents' and intervenor respondents' motions to dismiss. We endorse that response. Arguments made in that response will not be repeated here.

I.

THERE IS A CONTINUING AND ACTUAL CONTROVERSY THAT NECESSITATES RESOLUTION ON THE MERITS OF THE ISSUES UPON WHICH THE COURT GRANTED THE PETITIONS FOR WRITS OF CERTIORARI.

The Court, in granting the petitions for writs of certiorari, limited the questions to:

1. Whether regulations promulgated by the Environmental Protection Agency to prevent the significant deterioration of air quality are authorized by the Clean Air Act.
2. Whether the Clean Air Act permits the Environmental Protection Agency to adopt regulations which grant to Federal land managers and Indian governing bodies power to reclassify Federal and Indian lands within their jurisdiction.

No matter what effect the 1977 Amendments have subsequent to August 7, 1977—the date of their enactment—the Amendments do not address the issues before the Court. The questions remain whether when and as promulgated the regulations were statutorily authorized. Resolution of those issues remains important, as demonstrated by events that have occurred and continue to occur under the challenged regulations.

As an example, one of the petitioners in No. 76-619, Utah Power & Light Co. and respondent EPA are presently engaged in a separate suit, *Utah Power & Light Co. v. Environmental Protection Agency*, Civ. No. C-77-0063 (D. Ut.), which involves the application of the challenged regulations to three steam electric power plants which commenced construction prior to

June 1, 1975.² Respondent EPA has ruled that certain actions regarding those three units have occurred since June 1, 1975³ which constitute “modifications”, as that term is defined in the regulations.⁴

While petitioner Utah Power & Light Co. of course is not now seeking to argue the merits of that case before this Court, the above facts are important in light of respondents’ statement that “the regulations themselves, as sustained by the court of appeals, remain in effect *except to the extent superseded by the 1977 Amendments*” (EPA Motion to Dismiss, p. 7; emphasis supplied). As the intervenor respondents recognize, the 1977 “amendments modify the definition contained in the regulations for the commencement of construction (Sec. 164(b)) [sic.], a provision which governs which major new sources will be subject to review under the regulations and the statute” (Motion of Intervenor Respondents Suggesting Mootness, p. 5 n.2). Section 168(b) provides that “[i]n the case of a facility on which *construction was commenced in accordance with this definition* after June 1, 1975, and prior to the enactment of the Clean Air Act Amend-

² The validity of the regulations is not at issue in that suit. In fact, Utah Power & Light Co. could not have challenged the validity of the regulations in that suit. See *Utah Power & Light Co. v. Environmental Protection Agency*, 553 F.2d 215, 218-19 (D.C. Cir. 1977).

³ 40 C.F.R. § 52.21(d)(1) of the regulations states that “any new or modified stationary source . . . which has not commenced construction or modification prior to June 1, 1975” is subject to the review of new sources provisions of the regulations.

⁴ See EPA Motion for Summary Judgment, p. 2, Civ. No. C-77-0063 (D. Ut.). “Modification” is defined in 40 C.F.R. § 52.01(d). EPA is seeking to require Utah Power & Light Co. to add an estimated \$75 million worth of scrubber equipment to the three steam electric power plants.

ments of 1977, the review and permitting of such facility shall be in accordance with the regulations for the prevention of significant deterioration . . ." (emphasis supplied). "Commenced" is defined by the 1977 Amendments as a major emitting facility which "has obtained all necessary preconstruction approvals or permits . . . and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations . . ." § 169(2) (A). The challenged regulations—in contrast to the definition in the 1977 Amendments—define "commenced" as "a continuous program of construction or modification" § 52.21(b)(7) (emphasis supplied). In short, the "modification" of a source is no longer subject to the permit provisions.

However, in its most recent pleading in the Utah district court case, filed September 6, 1977,⁵ EPA continues to advocate that Utah Power's three steam electric power plants at issue must obtain permits under the regulations because of alleged "modifications." Absolutely no reference is made in that pleading to the 1977 Amendments. Since the definition of "commenced" in the 1977 Amendments alters the definition of "commenced" in the regulations, EPA's pleading in that case conflicts with its representations made in this Court in its Motion to Dismiss, filed August 26, 1977, "that if such regulations would be inconsistent with specified sections of the new statute, *the regulations shall be deemed amended to conform with the requirements of those sections*" (EPA Mo-

⁵ EPA Reply Memorandum in Support of Motion for Summary Judgment and Motion for a Protective Order, Civ. No. C-77-0063 (D. Ut.).

tion to Dismiss, p. 5) (emphasis supplied). EPA's continued enforcement of the challenged regulations as promulgated, and unamended by the 1977 Amendments, belies its argument that the issues in these consolidated cases are now moot. So long as EPA continues to enforce the regulations at issue here, this case remains a "live" controversy.

This situation is noticeably different from the one existing in *Environmental Protection Agency v. Brown*, — U.S. —, 97 S.Ct. 1635 (1977). In *Environmental Protection Agency v. Brown*, the government admitted that the contested regulations were invalid unless modified in certain respects. The Court therefore vacated the courts of appeals judgments and remanded for consideration of mootness. On remand, the Court of Appeals for the District of Columbia found the controversy moot. Not only had the contested regulations been modified, but "[t]he Administrator state[d] that he [was] not enforcing the regulations." *District of Columbia v. Costle*, No. 74-1013, slip op. at 4 (D.C. Cir. Aug. 19, 1977). In contrast, in *Utah Power & Light Co. v. EPA*, *supra*, the Administrator continues to enforce the challenged regulations that are before this Court.

Another example of the continuing importance of the issues in this case is a redesignation that occurred prior to the enactment of the 1977 Amendments. On August 5, 1977, the Northern Cheyenne Indian Reservation was redesignated from a Class II area to a Class I area pursuant to the regulations. 42 Fed. Reg. 40695 (Aug. 11, 1977). Petitioners discussed at length in their brief the land use impact of such redesignation, pointing out that a redesignation can affect land

use planning 60-100 miles outside of the redesignated area. Brief for the Petitioners in No. 76-619, pp. 39-44. In fact, the respondent EPA's ruling approving the Northern Cheyenne redesignation specifically noted that "the construction of electric power plant units known as Colstrip 3 & 4 . . . as proposed, would violate the Class I increments for SO₂ on the reservation . . ." 42 Fed. Reg. 40696 (Aug. 11, 1977). In a paper recently presented by EPA officials at the Annual Meeting of the Air Pollution Control Association, it was noted that the redesignation "could have a significant impact on proposed *future* development along the eastern boundary of [the] Crow reservation. . . ." Thus, the effect of the Northern Cheyenne Indian Reservation redesignation will be a continuing one.

The Court has described mootness as "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). The issues upon which the petitions for writs of certiorari were granted remain "live" and petitioners maintain a legally cognizable interest in the outcome as the above actions indicate.

That the Court should decide the merits in this case is supported by recent decisions. In *National Coal Operators' Ass'n. v. Kleppe*, 423 U.S. 388 (1976), the Secretary of Interior had issued certain civil penalty assessment regulations. Coal mine operators argued

* "Prevention of Significant Deterioration of Air Quality: A Western Viewpoint" 8, U.S. Environmental Protection Agency, Denver, Colorado (emphasis supplied), presented at the 70th Annual Meeting of the Air Pollution Control Association, Toronto, Ontario, Canada (June 20-24, 1977).

that the regulations violated the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. § 801, *et seq.* Subsequent to initiation of the suit, the regulations were reissued. Respondents, mine operators in the companion case, *Kleppe v. Delta Mining, Inc.*, 423 U.S. 403 (1976), argued that the case was moot. This Court rejected that argument, *inter alia*, "because there are assessments under the contested regulations awaiting enforcement". 423 U.S. at 393-394 n. 4.

Similarly, EPA is seeking to apply the challenged regulations to certain steam electric power plants under construction. As this Court has recognized, a case is not moot when "the challenged governmental activity in the present case is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Super Tire Engineering Company v. McCorkle*, 416 U.S. 115, 122 (1974).

Furthermore, Congress—which was aware of this litigation¹—included in the 1977 Amendments a savings clause that provides:

¹ The House Committee Report accompanying the bill to amend the Clean Air Act states:

These regulations were immediately challenged by both industry and environmental groups. These suits are still pending and will likely take several more years to resolve. H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 105 (May 12, 1977).

And the analogous Senate Committee Report states:

The Circuit Court of Appeals gave broad support to existing EPA regulations in its decision. The case is now on appeal to the Supreme Court, and has been accepted for review. The earliest this case could be heard would be in the fall of the

No suit, action, or other proceeding lawfully commenced by or against the Administrator . . . shall abate by reason of the taking effect of the amendments made by the Act. § 406(a) (emphasis supplied).

This Court has upheld the validity of savings clauses and ruled that cases pending on the date of enactment of a particular statute would not be affected where there was an appropriate savings clause. *See Train v. City of New York*, 420 U.S. 35, 41 n. 8 (1975); *Federal Trade Commission v. Goodyear Tire & R. Co.*, 304 U.S. 257 (1938). Thus, contrary to respondents' assertions, the "taking effect" of the 1977 Amendments does *not* abate these cases.

Subsection (b) of the savings provision is further evidence that Congress did not intend the 1977 Amendments to moot these cases. Section 406(b) provides that "[a]ll rules, regulations . . . or other actions *duly* issued, made, or taken by or pursuant to the Clean Air Act as in effect immediately prior to the date of enactment of this Act . . . and not suspended by the Administrator or the courts, shall continue in full force and effect . . . until modified or rescinded in accordance with the Clean Air Act as amended by this Act" (emphasis supplied). Thus, it remains for the Court to determine whether the regulations were "duly" issued.

1977 term of the Supreme Court. S. Rep. No. 95-127, 95th Cong., 1st Sess. 8 (May 10, 1977).

There is nothing in the legislative history that indicates Congress intended or foresaw that the 1977 Amendments would moot the cases presently before the Court.

II.

DISMISSAL OF THE WRITS AS IMPROVIDENTLY GRANTED IS NOT WARRANTED.

Respondents contend that "[i]n light of [the 1977 Amendments] . . . the questions upon which this Court granted certiorari are no longer appropriate for its consideration." Respondents seek a dismissal of "the writs on the ground that the subsequent legislation [the 1977 Amendments] has rendered the grants improvident" (EPA Motion to Dismiss, p. 6, 7). However, no matter what effect the 1977 Amendments have on the contested regulations, that effect could not warrant a dismissal of the writs as improvidently granted.

A dismissal of a writ as improvidently granted is warranted where circumstances that *existed* at the time of granting the petition for a writ of certiorari were not adequately brought to the Court's attention. Had *those* circumstances been adequately brought to the Court's attention "the writ would not have been allowed." *Furness, Withy & Co. v. Yang-Tsze Insurance Association*, 242 U.S. 430, 433 (1917). The occasional need to dismiss a writ as improvidently granted has been previously explained. With the large "volume of certiorari business, not to mention the remainder of the Court's business, the initial decision to grant a petition for certiorari must necessarily be based on a limited appreciation of the issues in a case. . . . The course of argument and the briefs on the merits may disclose that a case appearing on the surface to warrant a writ of certiorari does not warrant it. . . ." *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 521, 527-528 (1957) (Frankfurter dissenting opinion). In light of "circumstances, which 'were not . . . fully ap-

prehended at the time certiorari was granted' . . . the writ of certiorari will be dismissed as improvidently granted." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959).

Respondents have demonstrated no circumstances that justify a dismissal of these writs as improvidently granted. Indeed, in their response to the petitions for writs of certiorari, respondents noted that bills had been introduced in the 95th Congress to amend the Clean Air Act. (Memorandum for the Federal Respondents, p. 8). Respondents' basis for a dismissal is not related to relevant undisclosed circumstances that existed when the petitions for writs of certiorari were granted, but rather is founded on circumstances that have occurred *subsequent* to the granting of the writs.

The two cases, *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955), and *Cook v. Hudson*, 429 U.S. 165 (1976), relied upon by respondents for dismissal are readily distinguishable from the present cases. *Rice* involved a constitutional challenge to a contract clause. A state statute was enacted *prior* to the filing of the petition for a writ of certiorari. The "statute that belatedly came to the Court's attention in *Rice* reached precisely the same situations that would have been covered by a decision in this Court sustaining the petitioner's claim on the merits." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 417-418 n. 21 (1968). The Court remarked that "[h]ad the statute been properly brought to our attention and the case thereby put into proper focus" certiorari would have been denied. 349 U.S. at 76. Accordingly, the Court dismissed the writ as improvidently granted.

The Court in *Cook v. Hudson*, 429 U.S. 165, granted a petition for a writ of certiorari challenging the con-

stitutionality of the termination of a teacher by a Mississippi public school board. Subsequent to the termination but *prior* to the filing of the petition for a writ of certiorari, a Mississippi statute was passed that prohibited the type of school board action that took place. In light of that statute and a case decided subsequent to the time of granting the writ, the Court dismissed the writ as improvidently granted.

The writs were dismissed as improvidently granted in *Rice* and in part in *Cook* because of circumstances existing at the time of granting the petitions for the writs. In the present cases, respondents and intervenor respondents seek dismissal solely because of circumstances occurring *subsequent* to the time of granting the petitions for writs.

Although respondents contend that the writs were improvidently granted, they argue that "the controversy as to the issues on which certiorari was granted has been effectively *mooted* by the new legislation" (EPA Motion to Dismiss, p. 7; emphasis supplied). If indeed dismissal is warranted—which petitioners contend it is not—then these proceedings should be dismissed as moot.* Should the Court dismiss the writs as moot, petitioners respectfully request that in accordance with its long-standing practice it reverse or vacate the lower court judgment and remand with a direction to dismiss. See *Preiser v. Newkirk*, 422 U.S. 395 (1975); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 n. 2 (1950) and cases cited therein. In that manner "the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *Id.* at 40.

* Intervenor respondents have moved to dismiss as moot. See Motion of Intervenor Respondents Suggesting Mootness.

Intervenor respondents suggest that an alternative course of action for this Court is to "remand the cases to the Court of Appeals for determination of the effect of the new law on the regulations, as to the period prior to August 7, 1977" (Motion of Intervenor Respondents Suggesting Mootness, p. 8). Respondents believe "that little purpose would be served" by a remand. (EPA Motion to Dismiss, p. 7). Similarly, petitioners believe that such a remand is inappropriate. The lower court has already ruled that the regulations were authorized by the existing law. The 1977 Amendments do not address the issue of whether the regulations were authorized at the time of issuance. It is that issue which is before the Court. To remand to the court of appeals as intervenor respondents suggest could result in that court rendering an advisory opinion.

CONCLUSION

For the foregoing reasons, petitioners request the Court to deny respondents' and intervenor respondents' motions to dismiss. At the very least, neither of those motions should be granted by the Court prior to full briefing on the merits and oral argument. Should the Court grant the motions to dismiss, the judgment of the lower court should be reversed or vacated and remanded with a direction to dismiss, in accordance with the Court's established practice.

Respectfully submitted,

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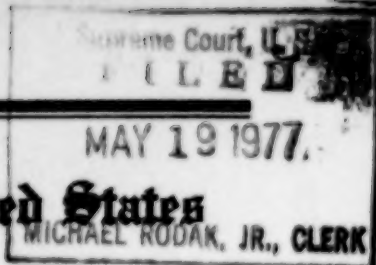
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976



No. 76-529

MONTANA POWER COMPANY, ET AL., *Petitioners*,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-585

AMERICAN PETROLEUM INSTITUTE, ET AL., *Petitioners*,
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No. 76-594

INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL., *Petitioners*,
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On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**BRIEF FOR THE STATE OF UTAH
AS AMICUS CURIAE**

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**BRIEF FOR THE STATE OF UTAH
AS AMICUS CURIAE**

The State of Utah, appearing by its undersigned Attorney General, respectfully tenders this brief as *amicus curiae* for the consideration of the Court. The State supports the position presented by Petitioners and urges this Court to reverse the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

THE INTEREST OF THE STATE OF UTAH

The State of Utah is directly and adversely affected by the decision of the court below. That decision would divest the State of its right, granted by the Clean Air Act, to determine whether and to what extent pollution-control measures more stringent than the national air quality standards should be enforced within its borders. As a result, the decision would greatly reduce the pollution-control options available to the State and would seriously interfere with the State's execution of the air quality management responsibilities vested in it by Congress.

Moreover, the decision poses a threat to the economic development of substantial areas within the State of Utah. With the exceptions of Alaska and Nevada, federal land ownership is more extensive in the State of Utah than in any other state. Under the prevention of significant deterioration regulations promulgated by the Environmental Protection Agency, the State of Utah is deprived of its primary responsibility under the Clean Air Act to control ambient air

quality within its boundaries. Specifically, 40 C.F.R. § 52.21(c)(3)(iv) of the regulations has the effect of delegating control of all lands within the State to Federal land managers. Thus, Utah's ability to control its land use and economic development is substantially impaired, if not abrogated. The State has a clear interest in seeking reversal of the decision below.

ARGUMENT

The ruling of the lower court is in fundamental conflict with Congress's determination concerning the respective roles of the Federal Government and the States in combatting air pollution. The Clean Air Act as amended in 1970 establishes a carefully balanced regulatory scheme: the Federal Government is to establish uniform ambient air quality standards for the protection of public health and welfare; and each State is to develop and implement a plan for achieving those standards or, if it sees fit, more stringent standards. The lower court has decreed a clear departure from this pattern by holding that the Federal Government is authorized by the Clean Air Act to disapprove State implementation plans for failure to provide for the prevention of significant deterioration and to promulgate regulations amending State plans to provide for such prevention. The lower court also permitted to stand regulations that grant to Federal land managers and Indian governing bodies the authority to redesignate Federal and Indian lands within the respec-

tive States. There is no basis whatever in the Act, its legislative history, or decisions of this Court interpreting the Clean Air Act for such interference with the States' performance of the air quality control functions assigned them by Congress.

I. Congress Did Not Authorize EPA To Impose "Nondeterioration" Requirements On The States

The lower court was unable to find any express statutory support for its holding that the Administrator of EPA must disapprove any State implementation plan that does not preclude significant deterioration of air quality. The sole statutory provision on which it based its decision was Section 101(b)(1) of the Clean Air Act, 42 U.S.C. § 1857(b)(1), which declares one of the purposes of the Act to be

to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population * * *.

From these words the district court in *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253 (D.D.C. 1972) divined a Congressional "intent to improve the quality of the nation's air and to prevent deterioration of that air quality" and declared invalid an EPA regulation that required only that State implementation plans "be adequate to prevent . . . ambient pollution levels

from exceeding . . . [the applicable] secondary standard" 40 C.F.R. § 51.12(b). The court's conclusion that the Administrator must require States to prevent deterioration in the quality of air that exceeds national standards, although there is no provision in the Clean Air Act to that effect, was affirmed *per curiam* by the lower court, 4 E.R.C. 1815 (1972), and by an equal division of this Court, *sub nom Fri v. Sierra Club*, 412 U.S. 541 (1973).

The regulations promulgated by the Administrator pursuant to the court's order in the *Ruckelshaus* litigation was upheld by the lower court despite its acknowledgement that "prohibition of significant deterioration of air cleaner than the national standards is not an express requirement of the Act" (A.46a-47a).¹ The court based its decision on its perception from "the legislative history of the Clean Air Act of 1970, a clear understanding that the Act embodied a pre-existing policy of nondeterioration of air cleaner than the national standards" (A.55a). As we show in Part II below, there is no support for the lower court's conclusion that the legislative history compels the inclusion of nondeterioration requirements in State implementation plans.

The State of Utah submits that it is clear that in adopting the Clean Air Act Amendments of 1970, Congress established a regulatory scheme in which *national standards* would be the benchmark of air quality. Its manifest purpose was that air of relatively high quality be "protected" against becoming inferior to those standards and that air of relatively low quality

¹ Reference is to the Appendix filed with this Court pursuant to Rule 36.

be "enhanced" to at least the level of those standards. The only "deterioration" prohibited by the statute is deterioration of air quality to the point where it would not meet the national standards.

Moreover, the court below erred in assuming that whatever Congressional purpose is reflected in Section 101(b)(1) is to be implemented only by mandatory action on the part of the Federal Government. On the contrary, in Section 101(a)(3) of the Act, 42 U.S.C. § 1857(a)(3), Congress found

that the prevention and control of air pollution at its source is the primary responsibility of States and local governments * * *.

Thus, if the Clean Air Act embodies a policy of minimizing deterioration of air whose quality now exceeds national standards, it is "the primary responsibility of States and local governments" to develop and implement that policy, not the Administrator of EPA. Indeed, Congress quite explicitly assigned that function exclusively to the States.

Finally, a generalized provision such as the "purposes" section of the Clean Air Act surely cannot be read as requiring the Administrator to impose "nondeterioration" standards on the States in the face of specific, substantive provisions of the Act that deny him that authority. Those provisions empower the Administrator to adopt only certain specified national standards, which do not include so-called "nondeterioration" standards, and they authorize him to disapprove a State implementation plan only if it does not make adequate provision for the attainment and maintenance of the national standards. The States remain responsible for determining whether and to what ex-

tent more stringent standards should be enforced within their respective jurisdictions, and all the Act *requires* of the States is that their implementation plans "achieve and maintain" the national standards.

Section 109 of the Act, 42 U.S.C. § 1857c-4, directs the Administrator of EPA to establish national primary ambient air quality standards for the protection of public health and national secondary ambient air quality standards for the protection of public welfare. In addition, Sections 111 and 112, 42 U.S.C. §§ 1857c-6, 1857c-7, direct the Administrator to establish federal standards of performance for new stationary sources and national emission standards for hazardous air pollutants, respectively. These are the only standards (other than for moving sources) that Congress authorized the Administrator to establish, and there is nothing in these provisions that could be read as contemplating the adoption of a "nondeterioration" standard by the Administrator.

Furthermore, Section 110 of the Act, 42 U.S.C. § 1857c-5, *requires* the Administrator to approve any State implementation plan so long as it meets eight conditions specified in that section. These conditions relate only to whether the State plan provides adequately for the attainment and maintenance of the national standards. They contain no direct or indirect reference to preventing the "deterioration" of air whose quality is better than the standards. In short, the statute neither authorizes the Administrator to establish a "nondeterioration" standard nor permits him to disapprove a State implementation plan for failure to include such a standard.

That State implementation plans meeting the criteria imposed by Section 110 *must* be approved by the

Administrator was definitely established by this Court's recent decision in *Train v. Natural Resources Def. Council*, 421 U.S. 60 (1975). There, the Court stated that Section 110 "quite clearly mandates approval of any plan which satisfies its minimum conditions," (*id.* at 71 n. 11) and that "[u]nder 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements," (*id.* at 79, emphasis by the Court).

The *Train* decision that the Act *requires* EPA to approve State implementation plans and plan revisions which provide "for the timely attainment and subsequent maintenance of ambient air standards" has been explicitly approved in two subsequent decisions of this Court, *Hancock v. Train*, 426 U.S. 167 (1976), and *Union Electric Co. v. EPA*, 427 U.S. 246 (1976). In *Union Electric Co.*, this Court pointed out that section 110(a)(2):

. . . sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator 'shall approve' the proposed state plan. *The mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified, Train v. NRDC*, 421 U.S., at 71 n. 11, 79, and none of the eight factors appears to permit consideration of technological or economic feasibility. Nonetheless, if a basis is found for allowing the Administrator to consider such claims, it must be among the eight criteria, and so it is here that the argument is focused. (427 U.S. at 257, emphasis supplied).

A unanimous Court held in *Union Electric Co.* that courts are not to review and overturn EPA's approval of a State implementation plan in response to "claims of economic and technological infeasibility" because EPA itself may not "consider such claims in approving or rejecting a state implementation plan" (427 U.S. at 256). And in *Hancock* this Court again acknowledged that under the explicit terms of the Clean Air Act, EPA is "*required* to approve each State's implementation plan as long as it was adopted after public hearings and *satisfied the conditions specified in § 110(a)(2).*" (426 U.S. at 169-170, emphasis supplied).

The court below flatly rejected this Court's clear and unambiguous interpretation of section 110(a)(2) contained in the trilogy of cases in which the Court has spoken on the issue. The lower court's justification for its adherence to its views of the Clean Air Act's commands in this regard rather than this Court's was that *Train* and *Union Electric* "did not consider the issue of nondeterioration" (A.64a), and that critical language repeated by the Court for the third time in *Hancock* was "(dictum)" (A.63a n. 39). The State of Utah respectfully submits that there is nothing in the mandatory language of section 110(a)(2) which this Court interpreted in both *Train* and *Union Electric* and reaffirmed in *Hancock* that in any way creates an exception for the issue of nondeterioration of air cleaner than the national standards.

Indeed, we believe that the case for continued application of the plain language of section 110(a)(2) is, if anything, an even stronger one here than was presented to the Court in either *Train* or *Union Electric*. For although Congress *mandated* only attainment and

maintenance of the national standards, it expressly authorized the States to establish local pollution control standards more stringent than the national standards. It did this by declaring in Section 116 of the Act, 42 U.S.C. § 1857d-1, "the right of any State" to adopt or enforce other pollution standards or limitations so long as they are not less stringent than the national standards. The deliberateness of this legislative action is underscored by the fact that, at the same time Congress left the possibility of bettering the national ambient air quality standards to the States, it specifically preempted them from adopting standards different from the federal emissions standards for motor vehicles, aircraft and fuels, see Sections 209, 211(c)(4), 233, 42 U.S.C. §§ 1857f-6a, 1857-6c(c)(4), 1857f-11.

The statutory pattern could not be more clear: the Administrator must set certain specified national air quality standards and may disapprove State implementation plans only for failure to attain and maintain those standards; and the States must adopt plans that will meet the national standards but are free to enforce standards more stringent than the national standards. The conscious specificity with which Congress made these assignments of duties and responsibilities is at war with any notion that it may have intended to impose a "nondeterioration" standard on the States by implication. On the contrary, its intention to leave the possibility of bettering national standards for the States to assess is perfectly apparent from the face of the statute.

II. Legislative History Provides No Support For Any "Non-deterioration" Requirement

The lower court sought to bolster its holding by referring to the legislative history of the Clean Air

Act (A.55a-62a). In view of the clear and unambiguous manner in which Congress expressly assigned the States and not the Administrator the function of considering whether to enforce stricter pollution-control standards, there is no occasion for resort to legislative history, *see, e.g., Packard Motor Co. v. NLRB*, 330 U.S. 485, 492 (1947); *United States v. Oregon*, 366 U.S. 643, 648 (1961). In any event, however, the legislative history of the Clean Air Act provides no more support for a "nondeterioration" requirement than do the words of the statute themselves.

The statutory provision on which the lower court relied, Section 101 of the Act, became law in 1967, 81 Stat. 485. There is not the slightest indication anywhere in the legislative history of that provision that Congress considered it as embodying a "nondeterioration" policy, much less as authorizing the Federal Government to force any such requirement on the States. Nor did anything in the legislative history of that provision qualify the Congressional judgment expressed in Section 101(a)(3) that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments" and not the Federal Government.

The provisions of the Clean Air Act effecting the present allocation of pollution-control functions as between the State and Federal Governments were adopted as part of the Clean Air Amendments of 1970, 84 Stat. 1676. The legislative history of the Amendments abounds with evidence of the Congressional purpose to leave the States free to determine whether to adopt standards more stringent than the federal standards, *see, e.g., H. Rep. No. 91-1146*, 91st Cong., 2d Sess. 1, 8 (1970); *S. Rep. No. 91-1196*, 91st Cong., 2d

Sess. 2, 10, 15 (1970); 116 Cong. Rec. 19205, 19220, 42384 (1970). The Senate bill would actually have *required* the States to consider and hold hearings on stricter standards, *see* S. Rep. No. 91-1196, *supra*, at 55, 87, but this provision was eliminated at the Senate-House conference, *see* H. Conf. Rep. No. 91-1783, 91st Cong., 2d Sess. 44 (1970). The fact that Congress thus deliberately refrained from requiring the States to *consider* more stringent standards surely refutes the notion that it intended to *require* the States to *adopt* such more stringent standards.

The scraps of "legislative history" cited by the lower court shed no light on the Congressional purpose in adopting the Clean Air Act. The court attached special importance to a passage on "continued maintenance of * * * ambient air quality" in the Senate Report (A.58a, quoting S. Rep. No. 91-1196, *supra*, at 11), but that passage dealt with provisions in the Senate bill that were never enacted into law, *see Hearings Before a Senate Public Works Subcommittee on Implementation of the Clean Air Act Amendments of 1970*, 92d Cong., 2d Sess. 273-74 (1972). The lower court also placed reliance on a 1969 federal "guideline" and testimony by certain federal officials in 1970 (A.56a n. 30, 57a); however, these statements were made in the context of prior legislation and earlier bills that distributed responsibilities to the States and Federal Government in a manner quite different from the statute as finally passed, and therefore have no probative value for present purposes.

III. The Regulations Abrogate The Responsibility And Authority Which The Clean Air Act Granted To The States By Providing For Reclassification Of Federal And Indian Lands Independently Of State Control.

A. THE STATES HAVE THE PRIMARY RESPONSIBILITY FOR ASSURING AIR QUALITY WITHIN THEIR GEOGRAPHICAL AREAS.

Throughout the history of the Clean Air Act, Congress has preserved the basic principle "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments." Section 101(a)(3), 42 U.S.C. § 1857(a)(3); *Train v. Natural Resources Def. Council*, 421 U.S. 60, 64 (1975). Section 107(a), 42 U.S.C. § 1857e-2(a), provides that "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . ." As we pointed out earlier, *supra*, this Court recently reaffirmed the principle of State responsibility in *Hancock v. Train*, 426 U.S. 167 (1967) and *Union Electric Co. v. E.P.A.*, 427 U.S. 246 (1976).

Senator Muskie, a major proponent of the 1970 amendments to the Clean Air Act, presented to the Senate the Conference Committee's report amending the Act and discussed the importance of State control:

I have been very much interested in preserving 'local option' features so that *State and local authorities would be able to pursue options among a broad array, seeking a possible way of controlling or preventing air pollution that is most responsive to the nature of their air pollution problem and most responsive to their needs.* In my judgment, the bill will give State and local authorities sufficient latitude in selecting ways to prevent and control air pollution. Senate Committee on Public

Works, 93d Cong., 2d Sess., A Legislative History of the Clean Air Amendments of 1970, 137 (Comm. Print 1974) (emphasis supplied).

Section 52.21(c)(3)(iv) of the regulations, which provides that "the Federal Land Manager may submit to the Administrator a proposal to redesignate any Federal lands to a more restrictive designation than would otherwise be applicable," deprives the State of Utah from controlling and preventing air pollution contrary to explicit provisions of the Act, decisions of this Court, and Congressional intent.

B. THE REGULATIONS HAVE THE OPERATIVE EFFECT OF DIVESTING THE STATE OF UTAH OF CONTROL OVER ITS AMBIENT AIR QUALITY.

The Administrator recognized that "the Clean Air Act places primary responsibility for the prevention and control of air pollution on the States and local governments" when he proposed the significant deterioration regulations (39 Fed.Reg. 31001)(A.167a). He further acknowledged that:

[a]ny policy to prevent significant deterioration involves difficult questions regarding how the land in any area is to be used. Traditionally, these land use decisions have been considered the prerogative of local and State governments, and in the regulations promulgated herein, the primary opportunity for making these decisions is reserved for the States and local governments. *Id.*

The fact is, however, that the regulations ultimately promulgated by the Administrator fly in the face of both the provisions of the Clean Air Act and of the Administrator's recognition that "traditionally" "land use decisions" are prerogatives of local and

State governments. For while the Administrator gives lip service to these truths, the regulations grant Federal land managers authority to independently redesignate Federal lands to the more restrictive Class I designation (Section 52.21(c)(3)(iv)), and Indian governing bodies are also granted redesignation powers over Indian lands within each State's boundaries (Section 52.21(c)(3)(v)). Furthermore, the State of Utah does not have the authority under the regulations to review any redesignation proposal of either Federal land managers or Indian governing bodies. Our only recourse under the regulations is to lodge our objections to any proposed redesignation with EPA, which may determine whether—in EPA's "judgment"—the redesignation "appropriately balances" not merely environmental concerns, but social and economic concerns of the redesignated area, the surrounding areas and national interests. It is clear, we submit, that this regulatory scheme is totally at odds with the Congressional edict so plainly set forth in the Clean Air Act that "[e]ach State shall have the *primary responsibility* for assuring air quality *within the entire geographic area comprising such State. . . .*" And when the Administrator's candid warning in his explanation of the actual impact of a Class I designation pursuant to the regulations is taken into account, as of course it must be, it will be seen that the practical effect of the delegation of land use authority to Federal land managers and Indian governing bodies in the State of Utah is to turn over control of *all* lands within the State.

[B]ecause of the small air quality increments specified for Class I areas, these levels can be violated many miles inside an adjacent Class II or III area. For example, a power plant which just

meets the Class II increment for SO₂ could under some conditions violate the Class I increment for SO₂ 60 or more miles away. Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State. Therefore, wherever a Class I area adjoins a Class II or III area, *the potential growth restrictions . . . extends well beyond the Class I boundaries into adjacent areas . . . [I]t should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment.* 39 Fed. Reg. 42512 (Dec. 5, 1974) (emphasis supplied) (A. 218a-219a).

Federal lands comprise 66% of the total lands in the State of Utah (Bureau of Land Management, *Public Land Statistics* 10 (1975)). Moreover, because of the ownership pattern of the federal lands there is no private of State land in Utah that is farther than twenty miles from the borders of the federal lands. It is thus manifest from the Administrator's acknowledgment that—despite apparent differences between the Classes established in the regulations for purposes of determining allowable pollution increments—the reality is that “allowable deterioration will be *dictated* by the adjoining Class I area rather than the Class II or III increment” and that the extent of such “*dictation*” could be “60 or more miles.” Thus when combining the realities acknowledged by the Administrator concerning the drift factor and the realities of the extent and pattern of Federal land ownership within the State of Utah, there is simply no question that a

consequence of the delegation to Federal land managers is to enable the Federal government to control *all* of the lands within the State of Utah—contrary to the explicit commands of Congress in Section 107(a) of the Clean Air Act and to traditional land use law which the Administrator recognized and then proceeded to blithely ignore.

Should the Court reach the issue whether the Administrator is authorized to thus delegate control over lands within the States, we respectfully urge that this Court adhere to its decisions in *Train*, *Hancock* and *Union Electric* and strike down the regulations insofar as they thus derogate from the States' primacy in the prevention and control of air pollution within the *entire* geographic areas comprising the States.

IV. The Regulations Prejudice Sound Air Quality Management.

The decision of the lower court, if allowed to stand, will severely hamper the State of Utah in its efforts to develop and implement an effective, integrated pollution control program for the entire State. Although the air quality exceeds national standards in large portions of Utah, other parts of the State have serious pollution problems. In order to attain and maintain optimum air quality levels throughout Utah, the State's regulatory capability must extend not only to the problem areas but to the high-quality areas as well. The decision below would make such sound air quality management impossible.

By imposing an arbitrary restraint on emissions in areas of high air quality, the Administrator would drastically reduce the pollution-control options available to the State of Utah. For example, the possibility

of alleviating urban pollution by encouraging the location or relocation of industrial enterprises in sparsely populated regions would be denied the State. The State's options would be even more limited in dealing with pollution caused by indigenous commercial expansion in such regions; it would either have to forbid such expansion or subject it to prohibitively expensive emission controls (assuming they are even available).

The unauthorized superimposition of Federal land manager and Indian governing body authority over classification of Federal and Indian lands within Utah severely aggravates the State's problems in this regard, leaving it virtually without control of meaningful options to deal with pollution-abating measures tailored to the needs and aspirations of all of Utah's citizens.

Congress did not intend that the States be thus hobbled in carrying out their air quality management responsibilities under the Clean Air Act. Quite the contrary, it deliberately left them free to determine what control measures should be employed in areas where air quality surpasses national standards. It made very clear its purpose of preserving the States' ability to select which among available options will be most responsive to local problems and needs, *see, e.g.*, 116 Cong. Rec. 32903, 42386 (1970) (statements of Senator Muskie). In short, Congress intended the States to have authority and latitude commensurate with the "primary responsibility" for air pollution control that is assigned them.

The State of Utah has accepted that responsibility and is fully committed to achieving and maintaining the most rigorous level of pollution control that is consistent with the best interests of all of its citizens in

all portions of the State. Indeed, in November 1969, prior to the enactment of the Clean Air Amendments of 1970, the State of Utah expressly adopted the policy "that new pollution sources will be controlled *to protect areas of present high air quality*" (Foreword to Utah Code of Air Conservation Regulations, emphasis supplied).

This policy has since been further refined to provide that

In areas of present high air quality where measured or estimated ambient levels of controllable pollutants are below the levels specified by applicable standards, any emission of pollutant to the ambient air must be shown to result in pollution levels, as determined by appropriate evaluating procedures, within applicable ambient air standards, and will be prohibited in any case unless shown to be controlled to afford the highest efficiencies and the lowest discharge rates that are reasonable and practicable. . . .

The limits of acceptable control will be determined on a case-by-case basis by the Air Conservation Committee of the Utah State Division of Health. This policy, which is of course more stringent than the standards laid down by the Federal Government, assures the people of the State of Utah that areas presently enjoying high air quality will, to the maximum feasible extent, continue to do so.

CONCLUSION

For the foregoing reasons, the State of Utah as *amicus curiae* urges the Court to reverse the decision of the court below.

Respectfully submitted,

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